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ABSTRACT

The following speeches and a pclicy statement from a meeting on private higher education are presented: "Frcm Campus to Capital: The Cost of Intellectual Bankruptcy," by Arthur Shenfield; "Educational and Professional Organizations and Their Effective Use," by John E. Horner; "Principles of Lawmaking and Public Administration," by Dallin H. Oaks; "Legislative Pclicy and State and Federal Regulations of Higher Education by AAPICU and the Scottsdale Conference on Church-Related Higher Education"; "New and Prcposed Federal Legislation," by Hal Visick; "'Bethink Ycu That You May Be Mistaken'--The Impact of State Laws and Regulatiens cn Independent Higher Education," by Jim Sullivan; and "The Administratien's Preparation for and Approach to Faculty Cclllective Bargaining," by Herbert D. Schwartman. (SW)

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# Private Higher Education: The Job Ahead

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## Volume 6

American Association of Presidents of Independent Colleges and Universities
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# Preface

The American Association of Presidents of Independent Colleges and Universities was founded to provide an opportunity for the presidents to exchange views and compare experiences, to examine common problems and seek answers to them, and to take formal action on matters of special concern to independent college presidents.

The following excerpt from the AAPICU By-Laws, Article II, Section 1-A, explains our membership policy:

> In general any person acting or serving as the chief administrative officer of a regionally accredited independent college or university is eligible to become a Regular member of the Association.

At the annual meeting held in Scottsdale, Arizona, in December 1977, it was voted to publish the formal speeches for the benefit of both members who cou'd not attend and others interested in higher education.

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Arthur Shenfield

# From Campus to Capitol: The Cost of Intellectual Bankruptcy

by Arthur Shenfield

British Economist and Barrister

Arthur A. Shenfield, economist and barrister, is currently Visiting Professor of Economics at the University of Dallas. He was Director of the International institute for Economic Research from 1971 to 1973. A member of the Mont Pelerin Society, he was its president in 1972. He practiced at the English Bar from 1946-55 and has taught at several American universities including Rockford College and Temple University. His publications include: *Government Expenditure* (1968), *The Roots of American Discontent* (1971) and *The Ideological War Against Western Society* (1970).

In *The Roots of American Discontent* [1] which Rockford College published a few years ago, I offered the opinion that the *liberal*[2] ideas in the ascendant in America either created or aggravated the problems or evils which they were thought by their proponents to be able to dissolve away; that they could not succeed in the sense of producing the kind of society which they were intended to propagate; that they could destroy the free society but could set up a new society short of a descent into totalitarianism; and that when that descent took place, *liberal* ideas would be displaced by openly totalitarian ideas. I went on to say

*"Thus the kind of society which "liberals" seek to establish is impossible and hence discontent must prevail as long as the attempt is made. They seek to retain part of the liberty which is the product of constitutionally limited government, but at the same time they undermine it by constantly extending the bounds of governmental action and authority. They seek to confer welfare upon the needy, but their governmental welfare programs constantly break in their hands. Above all they seek equality, but they constantly find that the kind of equality which they prize calls for totalitarian measures from which they shrink. Hence they are doomed to disappoint their supporters. At the same time, since they do succeed in crippling the free society, they also spread discontent among neutrals and opponents."*

Though the campus disturbances, apparently engendered by the Vietnam war, were then in full spate, I rejected the view that the war was a significant cause of the discontent which had become prominent in America. Now the war is over and the campus disturbances have largely subsided, but deep discontent remains. The brimming self-confidence of the old America has not returned. The optimism which was once the most distinctive identification mark of Americans (often considered brash and naive by those Europeans who believed that they were more familiar with the vanity of human expectations), has not revived. As they came to the bicentenary of 1776, Americans saluted the achievements of their ancestors, but they knew that they had strayed far from the principles of the Founding Fathers. *Liberal* ideas are still in the ascendant. The people may be told, and millions may believe, that *liberal* ideas are a development of, and an improvement on, the Founding Fathers' principles, but the development or improvement thus claimed has somehow failed to rekindle the pride and confidence in their destiny which was so prominent in their ancestors. Like all other western nations, and for reasons common to them all, the American nation remains a deeply troubled one.

It is a commonplace that the fate of human societies is determined by ideas, not interests. Interests appear to be a powerful motive force, but in fact men are moved not by their interests as such but by what they think their interests are; and what they think their interests are is determined by the ideas which grip their minds. In Keynes's golden words, often quoted and replete with a wisdom which his economic analysis mostly lacks,

*"The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back."*[3]

Though Keynes is not yet a defunct economist except in the sense that he is no longer with us in the flesh, and though it would be abusive to call him

a mere academic scribbler, he himself is a most illuminating illustration of the truth which he expressed in his famous quotation. For thirty years the western world has been mainly ruled by his ideas, partly in their authentic form and partly in the various forms given to them by his disciples. Or, to state the matter more accurately, his and his disciples' ideas have coalesced with other popular ideas of older and less respectable provenance and have given them a thrust which otherwise they would have lacked, so that acting as a merger Keynesianism and other ideas (for many of which Keynes himself had the utmost contempt) have formed a great power to hold us in thrall. And if now the signs are becoming prominent that Keynesianism is losing its grip in the circles where ideas are formed, though not perhaps yet among men of affairs, one may be sure that it will be other ideas, not simply interests, that will jump into the saddle and ride us to our destiny; which, after all, is why we have a crucial interest in the competition of ideas.

Who are the men who produce the ideas that govern us? In our generation, as in those that have preceded it, there are the rare seminal thinkers and there are the far more numerous popularizers. Among the popularizers there are numerous grades, from the scholar who is the serious student of seminal thought down to the slapdash journalist or the television wiseacre. However, in our generation a particular feature of the intellectual scene has come into prominence. It is the rise of the University or College campus as the home both of the few seminal thinkers and of a high proportion of the many popularizers, including those of the most superficial, unscholarly, and ill-instructed character.

Among the seminal thinkers whose ideas gave shape to western society in the two or three centuries before our own, there were some who taught and thought within the groves of Academe, but there were others of equal or greater fame and influence who did not. Nor did the prestige which gave special degree from the possession of an academic appointment. Indeed in some periods and countries the groves of Academe were an unfavorable milieu for the production of the ideas and for the establishment of the ideological prestige which captured the mind of the world.

So too with the popularizers. To a very large extent they were outside the academic world. Priests, clergymen, preachers, essayists, novelists, sometimes even practicing statesmen, these were mainly the men who spread ideas far and wide. They wrote mainly for an educated elite, but their influence rarely arose from association with the regular or established centers of teaching or research.

John Locke was a student (i.e. a Fellow) of Christ Church, Oxford, but he taught there for no more than four years. David Hume was a candidate for a Chair at the University of Edinburgh, but he was not appointed. Adam Smith, it is true, was a Professor at the University of Glasgow and a true academic. But Ricardo was a stockbroker, Malthus a clergyman, and John Stuart Mill an official of the East India Company. McCulloch and Nassau Senior were academics of a kind, but not until we reach the days of Jevons, Marshall and Taussig do the influential economists in the English-speaking world tend to be Professors (and Jevons had a non-academic career before becoming one).

Blackstone was a Professor, but more importantly a practicing lawyer, a judge, and a Member of Parliament; and Bentham was decidedly not an academic, though he founded University College, London. Austin, Maine, Maitland and Dicey were Professors, but Fitzjames Stephen was not.

Carlyle was not a Professor (he was Rector of the University of Edinburgh for a year, but that was not and is not an academic post). Nor was Herbert Spencer. Ruskin held the Chair of Fine Arts at Oxford, but this had little to do with his influential, though for the most part hopelessly ignorant and misconceived, ideas on economics and society. The Webbs, Shaw, and Wells were not academics, though, now coming into the twentieth century, Wallas and Laski were.

Hamilton, Madison and Jay were not academics (but where are the modern academics who could match the Federalist Papers in wisdom or in elevation of argument?). Emerson had a good Boston education, but he was a Unitarian minister. Thoreau and Hawthorne also were well-educated New Englanders, but not academics. William Graham Sumner was a Professor, but the marvellously learned as well as acute-minded Mencken, even though approaching the day of the ascendancy of the academic, left the Baltimore Polytechnic School at sixteen.

Descartes, Pascal, Montesquieu, Voltaire, Rousseau, Diderot, Quesnay, here is a list of men whose ideological influence can hardly be exaggerated, and there is not a Professor among them. So too later with St. Simon, Comte, Tocqueville, Taine, and Sorel, though Durkheim and Bergson were Professors.

In Germany the rise of the academic took place considerably earlier than elsewhere, a circumstance which I shall suggest has a bearing upon the implications of the rise in importance of the university in the modern western world. Leibniz was not a Professor, nor was Goethe, whose influence on his fellow Germans was great, though unfortunately not as durable as it deserved to be. But Kant, Fichte, Hegel and Nietsche were all university teachers or Professors (Schopenhauer held an appointment for a time at the University of Berlin, but he gave only one lecture there); and by the last quarter of the nineteenth century the Kathedersozialisten (socialists of the

Chair) were in the saddle for economic and social policy in the German-speaking world, outside Austria, as well as firmly ensconced in all the important university Chairs. In Austria their critics and opponents were also men of the Chair — Menger, Wieser, and Bohm-Bawerk (though Bohm-Bawerk was also for a time Austrian Minister of Finance).

In the world of science, though there were always a few seminal minds to be found in academic cloisters (e.g. Newton at Cambridge and Galileo at Pisa and Padua), the non-academic amateur was the principal pioneer in thought and experiment until fairly late in the nineteenth century. Lavoisier, Scheele, Priestley, Cavendish, Davy, Jenner, Faraday, Fabre, Darwin, Mendel, none of these was a university teacher or researcher. Even Huxley, the great popularizer of science (but at an elevated level), was an academic only in a modest sense. His Chair at the School of Mines in London was not one of eminence or distinction. However, Laplace, Gauss, and Pasteur were Professors.

The rise of the university to almost complete dominance in science is a natural result of the development of science. The enormous advances of modern science make it almost impossible for seminal work to be conducted except with the laboratory resources of a university (or of its associated research institutes), and with the intimate interchange of ideas and knowledge available there. It is true that in applied science a great deal of important work is done in the research and development departments of industrial companies, but this would be largely impossible if it were not nourished by the fundamental activity of academic science, not to mention the supply of university-trained personnel.[4]

However, in the fields of politics, economics, sociology, and public affairs generally the rise of the university is only partly due to the extent and complexity of modern knowledge; and its results have consequences very different from those of the development of academic science. I have referred to the fact that in the formative periods of our society, not only the seminal thinkers but also for the most part the popularizers wrote for an educated elite. This is why it was possible for ideas of an elevated character to be in the ascendant. But it is a mistake to think that the ideas which were aimed at the minds of educated men did not reach the minds of the less educated or uneducated. Consider the Federalist Papers. They were written for the educated newspaper-reading public of New York, but their arguments and illustrations seeped down to the majority of New Yorkers. The reason was that before the democratization of education, the less educated took their ideas principally from the educated. But the democratization of education was not the result of the development of mass education in the 3 R's. On the contrary the almost universal spread of the 3 R's (reading, writing and arithmetic) which happened at an early date in the United States, facilitated the downward seepage of the ideas of the elite. The elite in those days advocated the universal reading of the Bible, and read it themselves together with Shakespeare, Milton, Adam Smith, Blackstone and the like, and those who had mastered the 3 R's tended in fair measure to follow suit. What has subverted the realm of ideas and put many of a shoddy, superficial and anti-social character in the saddle, is the democratization of higher education.

If I may be forgiven for quoting myself again, in *The Ideological War Against Western Society* I said the following.

*"Democratization and the spread of education have had two baleful effects. On the one hand they have lowered the standards of intellectual life. On the other hand they have enormously extended the numbers of the intellectual class, which means in effect the numbers of retailers, since seminal thinkers are always few, and at the same time the spread of their influence. The lowering of the standards of intellectual life has not of course taken place at the pinnacle, but in the broadening and deepening of the intellectual world. Consider, for example, the case of economics. The classical economists of course made numerous errors; but how elevated, serious and judicial, even when they were not profound, were both their discussions and also the discussions of the journalists and men of affairs who took their cue from them! Their audience was small, cultivated, serious and able to detect and quick to reject the meretricious or posturing argufier. Modern economists at the top are far in advance of their classical forebears. They have developed and refined economic theory well beyond what could have been foreseen only a generation or two ago; and they have in recent years caught the art of making penetrating realistic studies which are greatly superior to the often barren descriptive work of the past. But take a step or two down to the historians, men of letters, philosophers, scientists and others who inhabit the Senior Common Rooms or Faculty clubs of our universities, or even to the great majority of those who have actually taken degrees in economics, and see what a sad muddle of superstitions, odd bits of half-understood theory, and downright errors inhabits their minds. Take a step or two further down and contemplate the millions who read the financial commentators, the Sunday supplements, and the best-selling popularizers, and see confusion even worse confounded. You may say that this is the result not of democratization but of the scientific development which makes economics, like other disciplines, a subject for specialists and professionals. So it is, in part. But the point is that the spread of education has caused millions to have views on economics, and to make a market for the purveyors of economic ideas, that is for intellectuals of the retailing kind. At the same time education has not enabled them to*

*think, to analyze, or to distinguish error from truth when, as often happens in economics, they are half-brothers.*

*In the general field of public affairs, the effects of the spread of education are even more striking. The masses are better informed about national and international affairs than they have ever been in the past. Just above the mass level there is a very large stratum of people of fair education who are always ready to be informed about public affairs by television programs and by newspapers and periodicals, and who thus form a ready and extensive market for the retailers of ideas. Has this raised the level of thinking and knowledge among those who shape political opinion? Of course not. On the contrary, it has depressed it. The general public of today is better educated and informed than its forebears, but it is less well educated and informed than the elite which managed public affairs in its forebears' times."*

When I referred to the pinnacle where standards are still as high as ever, I meant the pinnacle of the university itself, not the university as the pinnacle of the educational system as a whole. For the university now stretches down to low levels of the educational pyramid, where the debasement of standards is conspicuous. And when I said that the general public is better educated and informed than its forebears, I meant that it possesses a much more extensive stock of information about public affairs than its forebears, not that it is wiser than they. When public affairs were mainly managed by an elite, it was not only the elite which possessed political wisdom.

Below the pinnacle, the distinguishing marks of the university in the United States, and increasingly western Europe, are as follows.

i. A mass of students who arrive uneducated and leave no more than half-educated on graduation.

ii. A faculty of diluted quality, whose members increasingly display the outlook of trade unionists before all else, and conspicuously lack the mores suited to an elevated profession or the attitudes comely in those who are or ought to be the transmitters of scholarship and learning. Inter alia, this expresses itself in the growing rejection of standards of personal morality, as well as of conventionally civilized behavior, in the appointment of Professors, as if such matters had no bearing on the requirements for membership in a community of scholars.

iii. The politicization of learning and teaching, so that the campus becomes less and less a seed-bed of knowledge and more and more a battleground for mobs of various kinds (still essentially the case, even though the physical violence of the sixties has subsided).

iv. The rise of the Professor-cum-governmental consultant, who achieves fame and fortune in the corridors of power, and who drinks less and less from the Pierian spring and more and more from the intoxicating wells of political power.

v. The rise of the cheapjack or non-scholar Professor who achieves fame and fortune by selling to the mass market in pseudo-scholarly form the very myths and superstitutions which the mass market already cherishes.[6]

Thus, it is that the modern university (always excepting the genuine scholars at its pinnacle) has grown in importance in our society in parallel with the degeneration of its quality. As President Lyndon Johnson said in May 1966 in an address at Princeton University,

*"In almost every field of governmental concern, from economics to national security, the academic community has become a central instrument of public policy in these United States."*

The effect of the rise of the modern university would be baleful enough, even if its posture in the great political controversies of our time were neutral, or if its faculty were evenly balanced between the main contesting ideologies; for it would largely fail to offer true intellectual guidance. But there are important reasons why it tends to be preponderantly *liberal*.

First, *liberals* tend to favor governmental action and expenditure more than others, and therefore are well-known champions of expenditure on education. Everybody in the university, administrators, faculty, and students, but especially the faculty, have a strong and clear private interest in the ascendancy of those who will spend public funds liberally.

Secondly, since *liberals* tend to look to government (federal, state or local, but especially federal, where most of the money is) for the solution of social problems, modern government naturally produces a handsome and remunerative market for the extramural activities of the faculty. Those *conservatives* who believe in the limited state must obviously limit the golden opportunities for Professors which have become so familiar since the days of Franklin Roosevelt. It is not merely money which is at stake. Even more it is the power, influence and prestige which showing the politician how to shape the destiny of the nation or the world may bring. Where did President Roosevelt recruit his Brain Trust? From Columbia University, which gave him Professors Moley, Berle, and Tugwell. Mr. Moley later realized what a witches brew he had helped to concoct, and even Mr. Berle changed his mind on a few points in due course, but at an advanced age Mr. Tugwell has delivered himself of a book which shows that he has learned nothing and forgotten nothing in the forty-odd years since he produced his super-meretricious *The Trend of Economics*.

Thirdly, *liberals* have successfully

persuaded themselves and probably a majority of others that they prize and understand ideas much better than their opponents. It is the conservative businessman who is thought to be a Philistine, largely because the *liberals* have been very clever in depicting him as such. Hence the run-of-the-mill Professor, being in some sense a man of ideas, naturally leans to the *liberal* side. But the matter goes further. In the truly liberal society (i.e. the society of constitutionalism, limited government, and free enterprise), the material rewards of the teacher are relatively sparse. The principle that "those who can, do; those who cannot, teach" there has much force. The man who produces a better mousetrap is richly rewarded; the man who produces ideas, even better ones, normally is not (unless they are ideas of the kind used in the production of better mousetraps). In such a society the College "Professor" is of no great account. But the Professor has never been lacking in self-esteem. He has always had a good conceit of himself. The trade in ideas, he has always believed, is the highest of all trades — so high, indeed, that the commonplace word trade does not do it justice. Hence it has irked him to find that the free society gives him a relatively low precedence, while the man whom he despises, the Philistine businessman, is often accorded a high one. What is there better for him, he thinks, than the society which reverses these standings? It is no wonder, therefore, that he tends to favor the unfree society of unlimited government.

The resentment felt by the academic against the scale of material values apparently displayed by the free society is reinforced by the seductions of egalitarianism. Substantive equality is in principle the mark of the modern unfree society, though in practice it is soon and conspicuously discarded by that society. Equality before the law is both in principle and in practice the mark of the free society. These two forms of equality are diametrically opposed to each other, and neither can long survive in the presence of the other. Even the mere attempt to produce substantive equality is ruinous to the principle of equality before the law, which inevitably produces and protects substantive inequality. But substantive inequality appears to the inferior thinker to be injustice incarnate. Hence the power of the grip of egalitarianism, in the sense of substantive equality, over numerous academic minds, which thus propels them with additional force into the ranks of the champions of the unfree society. That a substantive equality does not long survive the victory of the unfree society does not, with honorable exceptions, disturb them, by reason partly of blindness and partly of hypocrisy.

An extremely depressing example of how the campus can thus become the home of totalitarian causes is now displayed by the universities in West Germany. Here is a society which was brought to ruin by totalitarianism but was subsequently rescued and brought to unprecedented prosperity by the rebirth of the principles of freedom. Facing it in close proximity is the East German state, which is one of the most odious examples of totalitarian tyranny to be found in the Marxist world, and which at the same time is much inferior to West Germany in prosperity. No West German can think of the blatant tyranny of East Germany as that of a far-off land of which he can know little or of a land with people of an alien and non-German character. Hence no West German, one would think, could possibly fall under the spell of Marxist ideology. Yet the West German universities now abound in Marxist and quasi-Marxist Professors, and some are dominated by them. Indeed the only institutions in West Germany of any consequence which are centers of Marxist strength or influence are the universities. In all other significant institutions common sense, even when unaided by analytical thought, is enough to lay bare the true face of Marxism. How can these extraordinary facts be explained, except on the basis that there are influences at work in the modern German university which have debased its standards and polluted its principles?

I referred above to the fact that the Professor rose to prominence in Germany before he did in other western countries. The German university of the 18th and 19th centuries was not a democratic institution. Nor was it an institution of debased intellectual or moral standards. On the contrary, at least by the 19th century, it was par excellence the home of serious and thorough scholarship. Thus it was very different from the modern western university, which has largely become the product of the democratization of higher education. Yet there was something in it which tended to make it the womb of modern totalitarianism. It was first and foremost a state university. Though it could resolutely defend academic freedom (in a genuine form, not in the spurious form often espoused by *liberals* in the modern American university — think, for example, of the Gottingen Seven) against the Electors, Kings, Archdukes, and Prince-Archbishops who maintained it, yet the belief in the virtue or majesty of state authority came naturally to it. When liberalism in the classical sense was strongly in the ascendant, the German university would not on the whole stand against it. But once some doubts arose about liberalism, if only in the form of qualifications of particular features of it, the German university was sure to develop and magnify them with great thoroughness and perseverance. Thus the seeds of the ideas which ultimately produced Nazism found a fertile soil in the German university, even though the men who sowed them were mainly men of high scholarship and integrity. The German campus surely played a leading role in the drama which ended in the ruins of Nazism.

However, it is in no way my purpose to suggest that the modern western university is sick beyond succour. On the contrary I shall argue below that quite apart from the fact that it is still

splendid at the pinnacle, there are good signs of reviving health at lower levels. But I do argue that it is a principal source of the sickness which afflicts western society, and that this arises in substantial measure from the acceptance of retrograde educational policies which masquerade as progressive. I shall also argue that this condition is curable.

Let us now consider the leading features of the descent from the free to the unfree society. I have already referred to the obvious contrast between the systems of limited and unlimited government, and have suggested that it is in the change from the former to the latter that the descent takes place. In this process the state assumes a number of forms, each of which leads us to tyranny and poverty. I shall call these the Santa Claus State, the Overlord State, the Fusspot State, the Harlot State, and oddly enough since all these forms suggest a state of force and power, also the Spineless State.

The Santa Claus State is normally known as the Welfare State, though it would more appropriately be called the Ill-fare State. It is popular in general because it appears to bring gifts to the people. It is popular with the poor because they think that they are getting something for nothing, and also sometimes, though not as often as their political and academic mentors would like, because they think that it hurts the rich. It is popular with those who claim to be imbued with compassion, though they tend to have the utmost contempt for the true compassion of private charity and their compassion is imbued at least as much with enmity for the rich as with solicitude for the poor. It is popular with all who are in favor of substantive equality, because its main driving force is the redistribution of wealth and incomes.

However, the Santa Claus State fails not only by the tests of a free society, but also by some of the tests of its own egalitarian champions. It makes everyone a client or ward of the state. It is self-perpetuating even when it declares its initial purpose to be to remedy temporary ills — temporary precisely because of the presumed effectiveness of State welfare. It produces a large, entrenched, and constantly expanding bureaucracy, the rules of which come to be more important than the aims of welfare itself. It undermines the Government's budget, inevitably propelling it into deficits which are met by the creation of money, which in turn produces the inflation which the Government pretends to dislike and offers to repress. It saps initiative, self-help, and thrift both by rewarding the unfit and by penalizing the fit. It eats up private capital, but fails to maintain public capital in the desired measure. It mortgages the society's future, blithely assuming that future citizens will be prepared to discharge the liabilities which it accumulates for them.

All this its egalitarian champions at least do not deplore but mainly welcome, mostly with enthusiasm. But even they, insofar as they have eyes to see, tend to be puzzled by and to deplore other failures. First, the cost of Santa Claus' gifts always outruns their value. The load of bureaucratic administration makes sure that this is so. Secondly, because the cost also always outruns expectations, it becomes necessary to impose heavy taxation not only upon the rich but also upon other classes, including the poor. Conspicuous discrimination against the rich is retained in the case of income taxes, but income taxes are not enough to sustain the Santa Claus State. Other taxes are needed, and these often bear relatively more heavily upon the middle classes or the poor, or both, than upon the rich. Thirdly, because the gifts are free at the point of receipt or consumption, the beneficiaries over-demand them or waste them. Then Santa Claus finds it necessary to limit them, or degrade them, or adulterate them, or at least to standardize them (which is a way of limiting their use and reducing their value or quality). Fourthly, owing to the fact that the gifts are governed by complex regulations which are not easily understood, it not infrequently happens that the middle classes or even the rich get a larger share than the poor. As Milton Friedman has put it, under the system of tax-supported public education the people of Watts (in Los Angeles) help to pay to send the children of Beverly Hills to College. It is grimly amusing and perhaps refreshing to see the modern egalitarian wrestling with these problems of his own creation. He cannot solve them because within the Santa Claus system they are insoluble. This is cogently illustrated by the degeneration of the National Health Service in Britain and of the system of public education and of the relief of poverty in the United States. But there are many other examples.

The Overlord State concerns itself with mighty problems which are created either by itself or the other forms of the state which I have listed, or which, if not so created, are soluble only by free enterprise, not by the state at all.

The most ambitious projects of the Overlord State are in the field of economic planning. These may range from an attempt to impose a complete centralized economic plan to the attempt to finetune the economy, or the control of wages and prices, or the regulation of particular industries, or the subsidization of particular industries or employments, or the geographical direction or manipulation of industry, or the diminution or removal of unemployment in general. These projects may be imposed upon the people by compulsion, or offered to them for their *voluntary* acceptance, but if the voluntary acceptance is not forthcoming the Overlord State tends to become angry and to threaten compulsion.

Both history and analysis demonstrates that the activities of the Overlord State (a) are destructive of essential freedoms, and (b) are generally counterproductive, not

merely failing to achieve their aims but often also aggravating the very problems which they are intended to solve.

Centralized and compulsory economic planning (which is typically represented by the modern communist economy or by the German war-time Zwangswirthschaft or command economy) obviously cannot tolerate any significant liberty for the people. The control of all sources of livelihood, and of all sources of communication and opinion-formation clearly makes for an utterly unfree society. But such economic planning also notoriously fails to achieve its own aims, as Mises, Hayek and others demonstrated many years ago. Indeed, what enables a centrally planned economy to work, though of course with far less efficiency than a free-enterprise economy, is the permission which it usually gives for the intrusion of some measure of free enterprise, though such intrusion, varying in importance from case to case, is contrary to its basic principles. As a general rule the greater the intrusion, the less inefficient is the system (e.g. the Polish economy, which has left agriculture in private hands, is less inefficient than the Russian; and in Russia the small private plots are less inefficient producers than the collective farms).

What about voluntary centralized economic planning? Here the great example used to be thought to be the French system of *indicative* planning. In the 1960's this was trumpeted to have the virtues both of planning and of freedom. However, experience has muted the trumpets. In the first place it was not wholly voluntary. The French Government used a stick as well as a carrot. Those businesses which complied with the Plan (or rather appeared to comply for appearance is often more important to governments than reality) were rewarded, and those which appeared to flout it were penalized. In the second place the figures produced by the Commissariat au Plan were as near to hocus pocus as any could be. They were supposed to induce increased investment and activity in each industry by assuring it that a parallel increase would take place in the industries supplying it or buying from it. But of course this could only be a conjurer's trick unless the Commissariat could solve the myriads of simultaneous equations which cannot be solved even with powers of compulsion, and which are the bane of all attempts at central economic planning.

The control of wages and prices, commonly adopted in the western world but fortunately for Americans, only briefly in the United States, is intended to deal with the problem of inflation, though obviously it can at best only repress inflation, not exorcise it. In this context there is a marvelous impudence about the posture of the Overlord State. It is the state itself, and only the state, which causes inflation; yet it is this same state which offers to cure it, at the same time attributing the cause to others, e.g. trade unions, business, foreign suppliers, or the people themselves. In fact wage and price controls not only do not cure inflation; they aggravate it. And into the bargain they distort the economy, undermining both its freedom and its strength.

The other devices or policies of the Overlord State are of essentially similar character. The finetuning of the Kennedy-Johnson years failed, but it distorted the American economy and prepared the way for the Nixon wage and price controls, which fortunately were short-lived. The regulation of industry, in the United States exemplified by the activities of the I.C.C., the C.A.B., the F.P.C., the F.M.C., and others (some are considered below under the heading of the Fusspot State), has been a prime cause of waste, inefficiency, and backwardness, which fortunately the American people are now beginning to understand. In Britain there is similar regulation, though differently organized, and in addition the monstrous nationalization of industry, which perhaps more than any other single influence, other than the Santa Claus State and the power of trade unions, has made the British people relatively poor and unfree.

Policies to *conquer* unemployment and to direct the location of industry are perhaps less prominent in the United States than elsewhere. But wherever they exist, their effect is counterproductive. At the same time they add strength to the forces which batter away at the people's liberty in the modern world.

The Fusspot State is a relatively recent growth. It did exist in the past when rulers imposed sumptuary laws upon their subjects and when craftsmen's guilds considered that it was their task, not the market's, to pronounce upon the quality of goods and to decide what might or might not be sold. In some respects M. Colbert, Louis XIVth's all-seeing and interfering Minister of Finance, was the supreme embodiment both of the Overlord State and of the Fusspot State. It need hardly be added that those who did not obey M. Colbert's rules found themselves in the galleys or on the rack. It was the great achievement of the 19th century that it liberated us from both of these states. Now we are enslaved again.

In the eyes of the Fusspot State the citizen is a fool and a weakling, blind and deaf to the signs of health, safety and welfare. Therefore the Fusspot State must protect him against the hazards of life. If he is disinclined to accept protection, it must be forced upon him.

Until 1962 the F.D.A. pronounced upon the safety of drugs, a function for government which is debatable but perhaps acceptable. Since then it has refused to allow drugs to be marketed unless it has judged them to be effective, above all a matter which free men would demand to decide themselves, generally with the

assistance of their advisors (i.e. doctors). The result has been a dramatic retardation of the output of new drugs and, indisputably, death and suffering for many Americans which under the pre-1962 practice would have been avoided. Similarly the Fusspot State in the shape of the F.D.A. cannot simply warn people that there may be dangers in the consumption of saccharin and cyclamates (if that is true); it must go further and prohibit it.

The Fusspot State must force motorists to wear seat belts and perhaps to have airbags in their cars, and of course pay for them. In mines and factories it must lay down stringent requirements for health and safety. Naturally, for everyone knows we are told, that workers are so foolish, reckless and blind, that they will accept any kind of danger and discomfort; and that employers are also so foolish that they cannot realize that safe and healthy working conditions are good business. As for a trade-off between higher wages and somewhat less comfort or safety, no human being must be allowed to engage in so foolish an exercise. In other matters also, and to a growing extent, we must allow our governmental Nanny to hold our hands, watch for our safety, and tell us from time to time to stop doing whatever we're doing.

It is in the field of the protection of the environment that the Fusspot State now has its finest fling. That it hardly succeeds in protecting the environment where it really needs to be protected, or that any genuine protection it gives tends to be at an exorbitant cost in lost production, gives it few worries. What really matters is its power to stop or delay industry in the process of investing and producing, and this power it uses with great and growing gusto. The observer of the modern Fusspot State must surely say, "I have seen the future, and it does not work."

The Fusspot State also believes that it can make all things bright and beautiful if only the people, like good children, will be obedient. Are there differences between white men and black men, and do they fail to love each other as brothers? Then enforce the busing of children in large numbers to and from school, so that black and white will sit side by side as they receive the non-education the state prepares for them. Are there natural differences between men and women? Then pass laws to extinguish their effect wherever any woman considers them repugnant. That these measures may be predominantly counterproductive, actually exacerbating the effects of racial or sexual differences, is beyond the ken of the Fusspot State.

The Harlot State presents what is perhaps the worst malady of modern democracy. No society can stand unless it has some concept of the general interest and some mechanism for giving the general interest priority over special interests. At their best this is what benevolent despots did. When ordinary men looked to their king to uphold the law and to humble the mighty, they saw him and the law as the embodiment of the general interest as opposed to the special interests of the more mighty of his subjects.

But benevolent despots and even kings who understood the law to be above them (c.f. Frederick the Great and the High Court in Berlin) were frail and unreliable protectors for the general interest. The victory of Parliament over the king in England, decided more by the Glorious Revolution of 1688 than by the execution of Charles I, as nearly as was then possible represented the victory of the people's general interest over all other interests. The American Constitution, especially in the first ten Amendments, capped and perfected this. For the protection of the rights of free individuals against the power of government was envisaged correctly as the supreme general interest. Given this protection, it would be difficult for any non-governmental special interest to bend them to its will.

Not so easily, however, are special interests denied what they consider to be their inalienable rights. From the very beginning the American Republic invited special interests to feed at the public trough by way of the tariff on imports. However, before the Civil War the tariff was only moderately high and much of it was for revenue purposes. The power of special interests (leaving on one side the "Peculiar Institution" of the South) could not then become very great because the power of the state was not great. It is only by capturing the power of the state that special interests become strong and menacing. Until the Civil War there was usually little value in buying the favors of the state because the state had few favors to offer.

In Britain the victory of Free Trade in 1846 and the general acceptance of a non-interventionist state produced a period in which the general interest not only prevailed but also was well understood. It was the period of the greatest progress in British history not only in economic matters but also in the development of an urbane, civilized people, with exceptionally high standards of public and private behavior; all of which has been traduced and betrayed by the socialism of modern Britain. Of course the enemies of private property will say that the protection of property is itself a special interest, indeed the worst of all, and that this was the distinguishing mark of the America and Britain of the 19th century. They do not understand that the protection of property rights is the protection of liberty (or to employ language which is much over-used, property rights are the [illegible]rd and support of human rights), and that this is the greatest general interest of all.

In both Britain and the United States, and indeed in all modern democratic countries, there has been a most deplorable process of degeneration which, if not reversed, will surely

prove fatal to democracy. It is a process in which the general interest becomes subordinated to a variety of special group interests, as a result of which legislatures cease to be arenas in which the purposes of the general interest are debated and determined but instead become playgrounds or battlegrounds in which special interests compete for the capture of the favor of the state — hence the Harlot State, which sells itself in turn to various bidders. The democratic process then becomes a war of all against all, conducted by an array of group interests. The democratic system ceases to aim its endeavors at the protection of the rights of the citizen against the power of the rulers, which was the first result of Parliament's victory over the king and of the foundation of the American Republic. Instead it aims at best at distributing the favors of the state reasonably amongst competing groups, and at worst at conferring those favors on the strongest group at the expense of the others. Now this inevitably drives the democratic state along the road to totalitarianism; for thus the rights of independent citizens or of unorganized or weakly organized groups are suppressed. The citizens tend to be blind to what is happening, for the process takes place under the guise of majority rule. But whereas majority rule was originally intended to protect the people against monarchical power, and therefore based itself on concepts of rights which belonged to minorities as well as majorities, in our day it has slid into a position in which any legislative majority, however fleeting, has the right to do anything. Under such a construction the temptation to ride roughshod over the rights of minorities becomes overpowering.

It is often difficult for Americans to perceive the nature of this process, because the legislative powers of Congress and of the fifty states are still subject to judicial review, which thus apparently still protects the rights of the independent citizen. Yet if this were as effective as most Americans believe it to be, the rise of the Santa Claus State and the Overlord State (and probably also of the Fusspot State) would have been impossible. Mr. Dooley no doubt exaggerated the matter when he said that the Supreme Court followed the results of the last elections, but it is obvious that with a time-lag the modern Supreme Court follows the behests of the Zeitgeist. And as the Zeitgeist beckons the people towards the Santa Claus State and the Overlord State, it inevitably drives the Supreme Court away from the protection of the rights of the citizen against the power of majorities which hold the state in fee.

Many Americans are also blind to this process because the modern Supreme Court appears to exercise itself energetically with the protection of minorities, for example black Americans, Spanish-speaking Americans, and women (who, though outnumbering men, are called in our Newspeak, a minority!). This is a fatal misunderstanding. In large measure what the Supreme Court engages in is not the protection of the rights (properly defined) of these minorities, but the furtherance of their power to infringe the rights of others, even though these others add up to a majority. Thus the white male citizen is forbidden to practice certain forms of discrimination which, whether contemptible or not in the eyes of God, are the inalienable rights of the free citizen and therefore no business of the state in a free society. The capture of the favors of the Harlot State by the most powerful or influential group does not mean that that group is necessarily a majority. On the contrary it is normally a well-organized minority battening upon the unorganized or ill-organized majority. Sometimes it may be quite a small minority which happens to control a swing vote or balancing vote the help of which larger groups need in competition with each other.

The war of all against all by way of the competition of groups for the favors of the Harlot State ought to be familiar to Americans because it became an obvious feature of their politics long ago. On the Federal plane the tariff became an obviously powerful agency of it after the Civil War. When, commencing with the Interstate Commerce Act of 1887, the Federal Government began to regulate industry, the process became even more obvious. Whereas previously the Government did so little that it was hardly worthwhile to buy its favors, it became very worthwhile indeed once the Government began to intervene seriously in the conduct of business. On the State plane, it long ago became a common phenomenon for various groups, especially business groups, to buy up the power of State legislatures. Indeed it often happened that legislators, in true harlot fashion, solicited business groups to buy up their favors. Again, it did not matter greatly as long as the State legislators had a modest view of their powers. In our times it matters enormously.

In Britain the historical process was somewhat different. The long period of Free Trade, from 1846 to 1932, together with the wise perception of the general interest by a marvelously public-spirited and self-disciplined people, who followed the precepts of good behavior largely by custom rather than law, prevented the onset of the degeneration of democracy for a long time. However, British democracy has degenerated so fast in our time that it now perhaps presents one of the worst examples of the Harlot State. The absence of judicial review has enabled the degeneration to accelerate, once the custom-enforced habits of good behavior began to crumble. In the British case the main power groups are now the various trade unions. They appear to act in concert, not in rivalry. But they act in concert only to enforce the rule of the Harlot State, and to force it to sacrifice the rights of the unorganized or ill-organized citizens. Given this as the first rule of politics, the various trade unions compete for the spoils. When Britain has a Labor Government, it falls to its knees and says to the

most powerful trade union leaders "Tell us your bidding, and we will run to perform it." When the Conservatives are in office, they must walk extremely warily for fear that a war will break out with the unions which, given the power of union organization, they may lose. This is the true picture of the disposition of power in modern Britain, even though the trade unions represent a minority of workers and even though the true believers in trade unionism are a minority of this minority. Of course this cannot last. If there is no fundamental change in this situation, British democracy must soon give way at least to an authoritarian system, if not to a totalitarian one.

Given the exercise of power by the Santa Claus State, the Overlord State, and the Gosspot State, and the sale of power by the Harlot State, it seems strange that there can be a Spineless State. Yet there obviously is. When it comes to the tasks which it really ought to discharge, the modern democratic state is a weakling. It apologizes for itself to its enemies, even while giving away the well-earned wealth of its citizens to them or to their clients, and it organizes its defense against them with little heart or spirit. Internally it fails more and more to protect its citizens against theft and violence. If the modern American city-dweller wishes to be safe in life and limb, he had better live in some complex defended by private guards. If he needs to transport large sums of money from one place to another, he had better employ a private security agency, for the public police will be of little use. If he has a claim in contract or tort against someone, he had better give very favorable consideration to private arbitration, for the system of public courts is so inefficient that he may have to wait years before they can decide his suit. These circumstances are now rapidly spreading to other western countries.

The Spineless State merges into the Harlot State. For the most fundamental function of all is to protect the general interest against special interests. Even when the modern state does not wish to play the harlot, it lacks the backbone required to discharge this function.

The rise of these various forms of the state produces a special interest which is growing rapidly and threatens to become the most powerful of all, namely the bureaucracy. Once it reaches a certain size the bureaucracy presents an uncontrollable challenge to all other interests, and especially to the general interest which it is supposed to serve. In the United States the very large Federal departments are now clearly beyond control. Thus, neither the President of the United States nor the Secretary of the Department of Health, Education and Welfare can now make that Department do his bidding. Nor can Congress control it. The President or the Secretary may issue orders, but unless they suit the bureaucracy, they will be circumvented. Congress may hold hearings on the Department, and its members may foam at the mouth about its doings. They will not have the real power to decide what will happen. In lesser measure this applies to other parts of the American bureaucracy, and to bureaucracies in other countries. Here too we have the phenomenon of the degeneration of democracy which must sooner or later transform it.

All these developments receive the plaudits of most of the intellectuals of our day (for the most part, the retailers or popularizers of ideas), and a high proportion of the intellectuals come from the academic campus. In this sense not only madmen in authority (where they exist), but also western societies in general have fallen under the sway of Keynes's academic scribblers.

What is the remedy? Clearly first and foremost that which is required is the subjugation of the ideas which are ruining us and the rebirth of an intellectual world in which those ideas will flourish which originally produced the splendidly free and prosperous society of the North Atlantic. Fortunately there are signs that this is beginning to happen. In *The Roots of American Discontent* I said the following.[7]

*"I have said that 'liberal' ideas display the characteristic features of ideas in the ascendant. But I also believe that they are somewhere near their apogee. Indeed I may have underestimated their speed of movement in orbit, for it is by no means impossible that they have already passed their apogee. In that case they have begun their descent and we may in the not too distant future witness the revival of the ideas which they have supplanted.*

*The beginnings of the revival of the humane, civilized, truly liberal ideas which created the American Republic are already detectable by the far-sighted. One reason why Clough could write 'Say not the struggle nought availeth' was that he could discern that 'far back comes flooding in the main.' The great majority do not see so far because they do not appreciate that ideas have a life cycle. They are born, they rise, they fall, they sometimes die and they are sometimes reborn and they rise and fall again. Even as some are rising, others are being born or reborn to take their place. On television, in public debate, and on the campus 'liberal' ideas still make the most noise and hold most of the commanding heights. But look closer at what is happening on the campus. Thirty-five years ago it was bliss for 'liberals' to be alive, and if they were young it was very heaven. Now serious scholars among them are uneasily aware of the shoals on which they stand. Amongst serious students of economics see how well classical ideas are now being received, and see how Keynesianism has been pared, qualified, diluted and amended so that what it is now given is conventional obeisance more than adherence.*

*I do not say that the process of revival must inevitably lead to ascendancy. A*

*disordered world is more likely to listen to soothsayers than do scholars, and the descent to totalitarianism is distinctly possible. But in America the issue depends upon the recovery of a confidence in itself which is a very recent memory. This is not an impossible task."*

It is not only Keynesianism which, though still powerful, is now on the defensive. All the brands of socialist ideas, though also still very powerful, are also on the defensive. If they are on the defensive, we may have hope that we can put them on the run.

Secondly, we need to make a fundamental change in educational policy. The attempt to make education at the University or College level available to all is a disastrous failure. It has not given true higher education to the students, and in large measure it has produced a degenerate faculty. Thus the campus has become the source of degenerate ideas. At the same time the general public has accorded prestige to these ideas because higher education still enjoys the prestige which it once deserved.

The place for universal education in a democracy is at the primary and secondary levels. At the level of higher education only an elite has the right to take part. At the primary level the firm establishment of the 3 R's, and at the secondary level the inculcation of true education (which the modern American high school lamentably fails to provide, but which the British public and grammar schools, the French lycee, and the German Gymnasium used to produce brilliantly), would create a general public to a large extent capable of sifting truth from dross in basic political and economic ideas. The reservation of the University and College campus to an elite would not guarantee that all ideas emanating from it would be true, intellectually respectable, well-founded, or relevant. Nothing can give such a guarantee. Even genuine scholars are liable to succumb to error, sometimes fundamental error. But the establishment of the high scholarly standards which the reservation of the campus to an elite would bring, would vastly raise the chances that intellectual gold, not dross, would come forth from it.

It is true that this was once the educational system of Europe, and modern Europe too has sadly gone wrong. But that is because the eternal vigilance required to preserve the excellences of European civilization was lacking. Without vigilance we are unlikely to succeed, and without eternal vigilance any success will always be in jeopardy.

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John E. Horner

## Educational and Professional Organizations and Their Effective Use

by John E. Horner

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My interest in the study of professional organizations was initially generated by the fact that I have increasingly felt at Hanover College that we should have a Vice-President for questionnaires just to analyze and accommodate the communications and paper work which emanate from these organizations and from governmental agencies. This observation, in no way, should be regarded as derogatory but as a reason for scrutinizing very carefully the rationale for participation by colleges and universities in these organizations. Obviously, such participation is not simply a philosophical consideration but can involve a major monetary commitment. Hence, I have launched into this professional area where little or no research has been done and where angels with any common sense at all would fear to tread.

To suggest that the statistical data presented in this kind of study is totally accurate is foolhardy. A new professional organization sometimes originates when three or four people gather at a red light preparing to cross the street at Dupont Circle in Washington, D.C. Organizations, likewise, die without notice and without notification to the National Center for Educational Statistics so that they do not become a vital statistic with the benefit of a formal obituary. Thus, I make no claim that there is finite and absolute accuracy to the statistical evidence presented in these remarks.

Perhaps a definition of a professional organization is in order before going too far. We are using the term, *professional organization*, to identify a collective body of colleges and universities or academic people engaged in promoting, protecting and propagating facets of institutional purpose and activity which relate to the interests, concerns and welfare of said institutions. For purposes of this discussion, we are also referring to organizations in which there can be an institutional membership and not solely a personal membership. As a result, we recognize that some organizations, such as the American Association for University Women, offer both institutional and individual memberships.

At the meeting of the board of directors of the American Association of Presidents of Independent Colleges and Universities on February 17, 1977, I was asked to analyze the whole gamut of professional organizations and to suggest to the presidents of independent colleges and universities a rationale or criteria for identifying those associations in which they might seek membership for maximal benefit to their institutions. The more descriptive and flowery title for these comments is stated in your program as *educational and professional organizations and their effective use*. My effort in this paper will not be to *push* or *sell* specific organizations but more to assist the college and university administrator to avoid pitfalls in making choices and in aiding the reduction of instant divorces from organizations which were hastily joined. Instant divorces from organizations are currently taking place as rapidly as domestic divorces in the larger society.

I am sure you can readily observe that the nature of this assignment is comparable to making a definitive object from *silly putty*. The amorphous nature of the task creates basic problems of analysis, organization and presentation. In any event, I shall approach the topic from the following points of view:

1. An overview of professional organizations.
2. A rationale for membership in professional organizations.
3. Dangers in identifying membership in professional organizations.

*I. An Overview of Professional Organizations*

American society has always demonstrated a strange and strong proclivity for *alphabet soup* in organizing itself. Governmental bureaus and agencies constitute the epitome of this kind of arrangement but professional educational organizations are rapidly closing the gap in competing for the top spot for identification through letters. A cursory glance at such associations reflects the lettered titles of A.A.C., N.A.I.C.U., N.A.C.U.B.O., A.C.E., A.A.T.S., N.A.C.U.A., N.C.A.T.E. and a host of others. Likewise, research brought to light the names of interesting and exotic organizations which the speaker had never known existed, such as the American Association of Nurse Anesthetists, the Alexander Graham Bell Association for the Deaf, the Association of Advanced Rabbinical and Talmudic Schools, the Council for Inter-Institutional Leadership, the Society for College and University Planning, the American Board of Funeral Service Education, Inc., the National Dance Association, the Association for Gerontology in Higher Education, the American Association of Sex Educators and Counselors, the National Association of Summer Sessions, and the Association for Academic Travel Abroad, Inc. I cite these organizations not in the spirit of ridicule but more to demonstrate the very high degree of specialization which has been reflected in recent years through the formation of professional organizations. To illustrate this point, our research found more than *300* professional associations in existence which could specifically and theoretically benefit private and independent colleges and universities. The *Education Directory*, published by the U.S. Department of Health, Education and Welfare, lists approximately *600* professional organizations and associations available for membership by all institutions of higher learning.

The overview process has also revealed that two words, *American* and *National*, dominate the titles of the professional organizations in the United States. These words are not only descriptive of the alleged breadth

of the audience which particular associations attempt to reach but it appears that this kind of labeling assumes a sense of status, prestige and respectability. More than *154* associations use the label, *American*. (Please note the name of our own organization is not excluded. We did not resist the temptation of projecting the sense of breadth by using the term, *American*.) Likewise, the caption, *National*, is applied to *149* organizations. I mention this point not to contribute to confusion with a vague and irrelevant reference but more to alert this audience to the fact that the organizations which carry these labels may not be as influential as the labels would convey. The dynamics of the world of Madison Avenue advertizing are obviously at work at this point.

Any overview of this subject is suspect until an organization emerges as one which serves a significant segment of the educational institutions in the United States with integrity which it purports to serve. The difficulty comes at the point of a direct versus an indirect relationship to the *ongoing* purposes of a given college or university. Over 32% of the organizations examined suggest an *allied, coordinate* or *joint* relationship. The professional effort in this relationship is not necessarily to serve directly but to enlist the support, both moral and monetary, of the participating institution. This condition is probably the more frequent alliance with a professional organization than the bonds which tie firmly and directly to a college or university. A suspicious illegality is not involved in such a relationship but integrity is. Empire building can be and is a disease among professional organizations. Their very existence does not always depend upon a strong or weak relationship to professional purpose but upon a continuing flow of dollars which will maintain the existence of the organization. The literature circulated by a large majority of such organizations certainly stresses the professional dimensions and concerns but it also emphasizes the imperative of quantitative participation. After all, "bodies do a professional association make," to adapt a Shakespearean reference. The letters of appeal for members, the character and content of brochures, the approach and wording of return reply cards, and the thrust of the follow-up process all indicate the necessity for survival, propagating the professional purpose which the association represents but they also reflect the quantitative need that if new members are not enlisted, survival may be a problem. These comments are not to suggest a lack of professionalism and a failure to make a genuine contribution to colleges and universities. They simply attempt to illustrate that professional organizations are finding that the competition for the participation, interest and monetary commitment by institutions of higher learning is becoming very keen and colleges and universities are becoming more selective as they find it necessary to use dollars wisely and to limit the investment of time and energy in external professional activities.

### 2. *A Rationale for Membership in Professional Organizations*

The more one studies this subject the more one concludes the *bona fide* need for professional identity by individuals and institutions in agencies which can bring them together for a common purpose. There is little doubt that professional organizations serve a useful purpose but no institution has the money, time and interest not to be selective in its memberships. Hence, there must be a rationale for the membership in particular professional organizations.

A rationale for membership in specific professional organizations must, in my judgment, relate to:

1. The educational and academic aims and purposes of the particular college or university.
2. The degree of educational and academic specialization within a particular college or university and the degree to which the professional organization relates to this educational and academic specialization.
3. The nature and quality of the professional service which can be rendered by a given professional organization.
4. The availability of consultative services offered by the professional organization.
5. The institutional dollars available for professional affiliation.

The above rationale also recognizes the imperatives of belonging to certain organizations where there is no choice involved. For example, membership in regional accrediting associations offers no choice. Similarly, there are memberships in state associations which are tantamount to being obligatory.

One of the biggest problems in arriving at a rationale for seeking membership in professional organizations is the *sorting out* of the proliferation of such organizations. It would appear that the dimension of proliferation will continue which will make the *sorting out* process more difficult. To wit, I address this matter of rationale with some fear and trepidation. Although I hesitate to suggest the guidelines for *sorting out* a choice, it is my firm belief that institutional needs and not professional propaganda should dominate the process of selection.

The American populace and American institutions thrive on group relationships. As Groucho Marx once said, "Americans will either join groups or group joiners." The essence of this statement is important in that it reflects the true tendencies not only of individuals but also of collections of people. Thus, it is never any problem to bring individuals together for a common enterprise.

However, why join a particular professional association or organization? There are those who would say that in the remarks of a

paper like this one there should be no advocacy. I would agree that there should not be an advocacy of specific organizations or associations, but I would argue that there should be and must be advocacy of the criteria which lead to the choice of organizations and associations for membership.

When the dues and membership fees were low for such organizations, it was relatively easy for colleges and universities to belong to an almost endless list of professional groups. This kind of alliance is no longer possible when we now find that the funds paid are used not only to underwrite office expenses but are also used to sponsor the honoraria for speakers at annual meetings, the social entertainment of constituents, and other extraneous expenses (often under the guise of "registration" fees) which have little relationship to the primary aims and purposes of the association or organization. Such economic conditions thus make it necessary that a college or university be very discriminating in its professional choices.

Hence, this paper advocates that membership in a given association or organization be *sorted out* in connection with three factors:

1. The *Service* factor — the organization must clearly show that it is rendering an important and immediate service to institutions of higher learning. Too many of these associations pose as servants to the colleges and universities which they represent but they rarely bring a vitality and dynamism which is genuine, constant and continuing.

2. The *Action* factor — too many professional agencies are characterized by the length and nature of the coffee breaks by their office staffs and not by a significant and vital representation in the arena of operation. A professional association which does not, in 1977, act consistently and constantly on behalf of its membership is of little or no value.

3. The *Communication* factor — too often, once dues are paid to an organization, the participating institutions are sometimes forgotten. Except for a sketchy newsletter or written report, communication is lacking to a marked degree in some professional organizations. Member colleges and universities are neglected and they only attract the attention of the leadership of the organization when a crisis exists or when the organization intends to make headlines in the daily newspaper. If the association fails to communicate with its constituents on vital and important issues and concerns, membership should not be pursued.

Over the years, numerous professional groups have often attempted to maintain a neutral status which, in the vernacular, can be translated to an attitude of "not making waves." Winston Churchill once stated that "many institutions of society have attempted to assume a position of sterile neutrality which prohibits action of any kind." Educational associations have particularly been guilty of this malaise. Hence, we would argue strongly that not only should the organization render a service but it must aggressively act upon its purposes and premises. To me, this is one of the major reasons for the attraction of the American Association of Presidents of Independent Colleges and Universities. It is a group which is actively willing to enter the political and bureaucratic arena to serve its membership and to communicate the results of its action in an effect to implement its purposes. This is the reason that I am a member of this association. In 1977, professional organizations can no longer remain passive and assume the role of ineffectual statesmen. These organizations must be now judged on their willingness to come to grips, practically and directly, with the major educational issues of our time so that the colleges and universities are effectively served.

The message which I bring to this audience tonight on this point doesn't involve the wisdom which might have come from ancient Olympus nor does it involve the counsel from exciting Delphi. To the contrary, it simply suggests that if a college or university is to gain maximal benefit from an alliance with a given professional organization, it must insure that the organization is willing to serve its membership through action and effectively communicate the results of its program of action.

### *3. Dangers in Identifying Membership in Professional Organizations*

In speaking of the anatomical attributes of Dorothy Lamour, Bob Hope once stated that "She supplies to the eye, *in spades* all that is needed for the appreciation of beauty." It seems to me that the reverse is true as institutions of higher learning more and more depend upon professional organizations and associations for information, guidance and direction. Such agencies do not supply "all that is needed" and certainly not *in spades*, for the purpose of developing institutional competence in a specific professional area. Some associations and organizations are attempting to be all things to all people by supplying consultative services, by issuing "how-to-do-it" handbooks, and by providing a stable of public speakers. These services are of some value but institutions should not be so naive as to assume that such services will provide the answers to all institutional questions and problems. The watchword of caution must be evident as colleges and universities fight their way through the maze of invitations to join professional associations. Please insure that to the best of your ability you are not putting "a round peg in a square hole" when it comes to the choice of a professional association for alliance, assistance, and monetary commitment.

One of the great dangers which comes to the fore in examining the literature and programs of professional organizations and associations is to

conclude that some professional groups assume a position of an accrediting body or a quasi-accrediting body. The literature of some of these organizations, particularly if there is only one such organization in existence in a given professional area, conveys the notion that the organization is indeed overseeing, protecting and supervising the activities in a specific area. Although these organizations are not accrediting bodies, they nevertheless produce policy statements, position papers and recommended practices which indeed appear to have the full force and implied impact of accreditation. For example, N.A.C.U.B.O. (National Association of College and University Business Officers) sometimes makes recommendations to institutions which apparently move very rapidly from the status of recommended procedure to the position of accepted practice. Ultimately, these recommendations, in effect, become cast in concrete and if institutions do not adhere to them, after they are put in print, they are regarded as being professionally remiss. Other organizations and associations could be cited which tend to perform this same role.

In addition, two or several associations may join in compiling or endorsing policy statements which have the implied force of policy. For example, the Association of Governing Boards of Colleges and Universities (the only organization of its kind which brings together trustees of institutions of higher learning) and the American Association of University Professors have formed an alliance on the controversial policy of governance entitled, "Shared Responsibility" which in the minds of many educators is not only a contradiction of terms but also the projection of an impossible concept.

Perhaps the statement of Alfred Lepowsky applies in this consideration of the potential misuse of the role and function of a professional organization: "When organs of society assume a responsibility not assigned to them, they perform a role which can be both destructive and detrimental." It has been both amusing and interesting to me to note that when the program for this annual meeting of AAPICU was published, I received a significant number of contacts from executive directors or executive secretaries of professional associations inquiring about the content of my remarks and more specifically as to whether I was going to advocate membership in particular associations or organizations. These contacts also suggested that if advocacy were involved, they wanted so-called "equal time." Although I am flattered that my talk has attracted some attention, it is interesting that strange developments do indeed come out of the woodwork when a sense of anxiety and perhaps insecurity exists and when a talk might constitute a threat to a professional agency.

Some specific dangers involved in selecting membership in professional organizations currently center on three problems, in my judgment:

1. The strong propaganda, and I stress the word, *propaganda* used by the organizations of allying with the "cream" of institutions of higher learning is a major psychological thrust. In some cases, *slick* advertizing techniques are being used to design and prepare the brochures which are employed in cultivating members. Many professional organizations, particularly the newer ones, are *marketing* their agency; they are not solely providing a service in the simplistic sense. Selling techniques are at work in a marked degree. Hence, colleges and universities must be prepared to separate the propaganda from the real purpose of the professional organizations.

2. The *pedigree* of the people directing the activities of the organization should be examined carefully. Employed executive directors or executive secretaries of such organizations are becoming more and more in evidence. The larger the organization becomes, the more it appears that the professional staff assumes the responsibility for the daily operations of the organization. Staff empires are built and the role of the membership becomes minimized on a policy and operational basis. However, the process which I have attempted to describe often has a direct relationship to membership dues which are assessed. Bureaucracy can be tolerated when true service is rendered and when the best interests of the membership are served. However, it is sometimes very evident that the larger the bureaucracy the more unwieldy it becomes to effect policy and to bring change in the policies and operations of the organization.

Correlatively, an extensive examination of the composition of the committees and of the elected offices is very important if a danger is to be overcome. If positions of leadership are dominated by individuals from particular kinds of institutions, it is very likely the policies and concerns reflect the background of leadership. I think that this observation can be fairly made concerning the N.C.A.A., the American Council of Education, the Association of Higher Education, to cite only a few examples. If your institution does not fit into a particular framework, you should exercise caution.

3. A third danger relates to the scope of the purpose and, more particularly, the implementation of the purpose of a given organization. A careful study of the purposes, and the pattern for implementing these purposes, of more than twenty-five organizations studied in considerable detail, indicates that there is an apparent proliferation or conflict of purpose in order to be competitive. A primary example of the recognition of a conflict of purpose and function within a professional association is the recent split which has resulted in the continuation of the Association of American Colleges (A.A.C.) yet brought to life the National

Association of Independent Colleges (N.A.I.C.U.). Although there is a growing number of professional organizations, there is also an emerging process or *overlap*. There are too many organizations which are performing essentially the same purpose with only slight variations in their procedures and operating principles. Careful study and investigation should be given to all aspects of the operation of a given organization. For example, what would be the essential differences between the National Association for Gifted Children and the American Association for Gifted Children? A study of the literature emanating from these organizations shows very little difference in purpose and procedure, except for the descriptive language which is used in the literature. Other examples could be cited *ad infinitum*.

Perhaps these remarks have conveyed an attitude of suspicion concerning professional organizations. To convey this impression has not been my intent. Rather, I would hope that these remarks would have alerted my listeners to the fact that there is an organizational "grab-bag" out there of such proportions and dimensions that considerable caution must be exercised before the intent to join is promulgated. The study of the purposes, aims and objectives of an organization is not only imperative but necessary. "Follow the leader" tactics will not always suffice and the historical background and contribution of a professional association may no longer hold up and the association may have now moved to a point of obsolescence for all practical purposes. Traveling the avenue of professional organizations is like traveling the *yellow brick road* with Judy Garland. The choices and options are many but great care must be exercised to make the right choices so that the professional Wicked Witch of the West does not lead us into organizations which do not accommodate our institutional purposes; which do not fulfill our institutional needs; and which do not serve and service the ongoing program of the college or university.

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Dr. Dallin H. Oaks

# Principles of Lawmaking and Public Administration

by Dallin H. Oaks*

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One of the most important books of the Twentieth Century is *Parkinson's Law*, a 1957 publication by C. Northcote Parkinson, Raffles Professor of History at the University of Malaya. This book is important because it is wise and readable. It is wise because it applied good common sense to questions of public policy. It is readable because of its style: lively, brief, specific, and satirical. It was so interesting that it slipped right by the defenses most of us raise against any new insight that threatens our complacency or prejudice.

Parkinson's first law proclaims that "work expands so as to fill the time available for its completion." That law had two axioms: (1) "An official wants to multiply subordinates, not rivals," and (2) "officials make work for each other."[1]

In 1960 Parkinson published another book containing his second law: "Expenditure rises to meet income." The preface declares that this book was intended to show "that a greatly reduced revenue would bring about an improvement, not a decline in the public services." Parkinson explains this astonishing conclusion as follows:

*"It is the paradox of administration that fewer people have less to do and more time, therefore, in which to think about what they are doing. When funds are limitless, the only economy made is in thinking. The worse inefficiencies do not stem from a lack of funds but from an initial failure to decide exactly what the object is. It is this muddled thinking that leads to waste, and often to waste on a colossal scale. Toward eliminating public waste, an essential step is to limit the total revenue."*[2]

Inspired by Parkinson's wisdom and by his knack of making his insights memorable, I have sought to apply similar insights to the process of law-making and to some current features of public administration. I have thereby entered, with some temerity, upon the formulation of what I have chosen to call "Oaks' First Principles of Law-Making and Public Administration." So far I have three principles, with a number of illustrations, and some associated hypotheses.

I evolved my first principle of law-making and public administration by posing variations on Parkinson's first two laws. Thus, if "work expands to fill the time available for its completion," as Parkinson's first law affirms, then this surely implies that as the staff of a department increases the amount of work accomplished by the average staff member will diminish so that the total work accomplished by the department will not exceed what is necessary to complete its assignment. Similarly, if "expenditures rise to meet income," then it follows, as Parkinson himself explained, that the money bureaucrats save in one direction will surely be wasted in another.[3]

By this process — reasoning from variations on Parkinson — I arrived at my first principle of law-making and public administration: *Law expands in proportion to the resources available for its enforcement.* The expanding law referred to in this principle is not limited to the law in the statute books. It includes the regulations of administrative agencies, the rulings of regulatory bodies, and even the individual actions of government servants.

The first principle is verified by the common observation that a government's bureaucratic army is never demobilized. If a government agency is created or a government worker is employed to accomplish a task which is later accomplished, experience teaches that the public employment rolls will not be reduced. The bureaucratic army will be transferred to another front, and if there are insufficient conflicts to justify their continued mobilization, they will start some. When this happens, we realize that the agency's formal goal of giving the service desired by taxpayers and citizens has been displaced by the controlling goal of providing continued employment for the workers and a secure power base for the leaders.[4] All of this assures that law and government activity expand in proportion to the resources available for its enforcement.

The process is not easy to counter, since it seems to rise out of human nature and exists in private as well as public employment. It is worse in government because government activities are not disciplined by the constraints of a competitive market place. If someone challenges the tendency to put personal goals ahead of public service in government employment, bureaucrats take up the same position as sheep or cattle in the presence of wolves, a position Parkinson described as a tight circle with horns outwards and the weakest in the center, "yielding nothing, denying everything, concealing all."[5]

A distinguished British scholar showed this principle in operation in the behavior of what she called "civil servants and academics and all kinds of social experts whose livelihood and advancement depend upon a continuing supply of social problems and deprived citizens."[6] Her study showed these social planners perplexed at the substantial number of deprived individuals who appeared to be unaware of their deprivation and unwilling to claim the social welfare benefits to which they were entitled under British law.[6] As a result, "the government did what any businessman does when sales are flagging. It mounted an expensive advertising campaign begging people to use" their welfare benefits.[6]

When I first read that description I thought it farfetched. Imagine, government workers trying to multiply welfare expenditures! I accepted its accuracy a few months ago when I was exposed to an intensive advertising campaign on commercial radio stations in Salt Lake City urging qualified persons to use federal food stamps and lamenting the fact that this valuable benefit was being used by fewer people than the government planners had estimated. The effort to promote welfarism is surely a successful one. In the decade from 1965 to 1975 the number of participants in the food stamp program has increased from 1 in 439 to 1 in 13, and public expenditures have soared from $36 million to $5.2 billion, 150 times its level 10 years ago.[7] Truly, if resources are available, law or government activity seems inevitably to expand to consume them. I conclude this reference to food stamps with a comment on welfare reform. The rash of proposals to reform our decrepit welfare system seems to confirm what Arthur Block has dubbed "How's Law: Every man has a scheme that will not work."[8]

Before introducing my second principle I will share three hypotheses I have formulated in connection with my work on the first principle. All are closely related to the matter of law-making and government resources, but none has yet been tested sufficiently to be put forward as a full-fledged principle.

The first hypothesis states that the *public is easily fooled by government claims of economizing.* Inefficiency is easy to conceal because governments have no competitors in the performance of their functions. The complexity of government also inhibits public understanding. As they say in the nation's capital: "If you're not confused, you're not well informed."

A clever leader can nearly always take public insistence on government economy and turn it to his own advantage. For example, most of us can recall some candidate for public office who has campaigned on a platform of reduced government spending and employment. Elected to office, such a politician may achieve reductions, but the more likely outcome is further increases. The conventional way to promote economy and to reduce spending is to hire experts to analyze the problems and recommend solutions, others to evaluate the suggestions, others to write regulations to implement them, others to supervise their enforcement, and others — public relations specialists — to praise the results and persuade the public of their success.

This is the way of most government economy drives. A government official makes himself a hero and the people — both taxpayers and spectators — think they see a great improvement. In fact there has been an increase in both government regulation and government employment.

As another hypothesis I suggest that *an uninformed lawmaker is more likely to produce a complicated law than a simple one.* This hypothesis is grounded in the same truth relied on by the man who apologized for writing a long letter and explained that if he had more time he would have written a shorter one. If lawmakers understand a problem and agree on their objective, they may be able to express themselves with an elegant simplicity that is sure to be absent if their law-making efforts thrash about in ignorance and discord.

My final hypothesis in this series is a variation of Gresham's law, the well-documented economic principle demonstrating that "bad money drives out good money." By the same token, I hypothesize that *bad or complicated law tends to drive out good judgment.*

One of the principal effects of the private foundation provisions of the Tax Reform Act of 1969 has been to require greater and greater reliance on lawyers in the administration of charitable giving.[9] As this portion of the tax law has increased in complexity and its legal boundary-lines have become less and less distinct, the area for the administrators of charitable funds to exercise their good judgment has diminished. More and more administrative questions must be submitted to lawyers. As lawyers have gained an effective veto power over larger and larger areas of charitable fund administration, these organizations are inevitably less flexible and less venturesome. The legal profession, whose doubts can only be satisfied by precedents, is rarely comfortable with innovation.

Bad laws — especially complicated ones — can also cause administrators to be so preoccupied with whether something is *legal* that they wholly neglect to consider whether it is *wise*. Some years ago I was asked to advise on a complicated reorganization of business activities. There were two objections to the proposed reorganization: it was unwise as a matter of business judgment and it might bring unfavorable tax effects. Unfortunately, the responsible administrators became so preoccupied with the complexities and challenges of the tax law that they came to see this as the only question. When they received a favorable tax ruling they treated that victory as having satisfied all doubts, and rushed into a business reorganization they would never have considered if they had not let bad law displace good business judgment. The lesson to be drawn from this experience is that a task not worth doing at all is not worth doing well.[10]

## II.

Oaks' Second Principle of Law-Making and Public Administration is that a *bad law is more likely to be supplemented than repealed.* Our statute books contain many bad laws that have been supplemented and very few that have been repealed. The current popularity of so-called sunset laws, which would automatically extinguish government programs or agencies after a certain period of time unless they were deliberately renewed, is welcome evidence of public uneasiness with this situation.

For example, consider the minimum wage. Economists have told us for many years that minimum wage laws increase unemployment, especially among "workers on the lowest rung of the employment ladder — the very young and old, minorities, and the handicapped."[11] An employer who will hire a marginal worker at $1.50 an hour, will not hire him at $2.65. The employer will try to economize by mechanization or other means, which will increase unemployment among many of the workers the minimum wage law purports to protect. But the favorable political effects of minimum wage laws generally prevail over their unfavorable economic effects.

Instead of being repealed, the bad minimum wage law is supplemented by unemployment and welfare legislation. One law puts the marginal employee out of work, and other laws support him in idleness. Or, the government seeks to offset the unemployment caused by minimum wage laws by increased government employment, as the administration advocated in recent hearings on proposed increases in the minimum wage.[12]

These offsetting laws are reminiscent of the well-meaning federal agency that sought bureaucratic approval to save space and clerical help by destroying outdated files. Permission was granted, but only on condition that the agency make one copy of everything before they destroyed it. The tendency to supplement a bad law rather than to repeal it is also reminiscent of the two novice businessmen who established a roadside stand. They bought a load of melons from a farmer for $1.00 a melon, trucked them across the valley to their stand, and sold them, for $1.00 a melon. Then a second load, purchased for $1.00, trucked, and sold for the same. As the partners returned with their third load one observed, "You know, we're not making much money in this business." Quickly agreeing and anxious to be helpful, his partner asked, "Do you think we need a bigger truck?"

Laws that were good in their origin and initial effect sometimes accumulate bad effects with the passage of time. But even outdated laws are seldom repealed. The City of Chicago has a ban on sidewalk cafes. At the turn of the century there was a reason for such a rule: Chicago had so many horses that their collective droppings — ground under foot, dried, and sent swirling by the city's

famous winds — made outdoor food consumption a significant health hazard.[13] The horses are gone, but the ban remains, and its enforcement and supervision (and that of similar regulations) provides welcome employment — dare one say Daly employment? — for an army of patronage workers. Other rules become unreasonable as one zealous bureaucrat seeks to outdo another, like the storied pentagon executive who coined a security classification more secret than top secret: DBR — "Destroy Before Reading."

Many of you will remember Professor Martin Anderson's demonstration that the effect of urban renewal programs was not to improve the housing of the poor, but rather to pack them into living quarters that were frequently more expensive and less desirable than the slums from which the federal bulldozer had evicted them. Anderson concluded that "the means employed by the federal urban renewal program will not achieve (the goal of a decent home and a suitable living environment for every American) as rapidly and effectively as the means employed by free enterprise — if at all."[14]

In the first 22 years of urban renewal, 1949 to 1971, the federal government spent approximately $11 billion to demolish 538,000 low-income housing units, but only 200,000 were replaced, and only half of these with low- or moderate-income units. The net result of this federal housing program was a *reduction* of about 400,000 low income units in this period, with resultant overcrowding and increased prices for low-income Americans.[15] The damage inflicted by the urban renewal laws during this period had to be remedied with a host of other legislation.

Rent control provides another example. Everywhere it has been tried, the inevitable economic effects of controlling rents has been to inflate demand and to diminish supply. Where rents are kept artificially low, consumers use relatively more housing than where housing is priced at a market rate in relation to other needs. At the same time, landlords are deterred from maintaining or renovating old housing and from building new housing because rent control prevents them from obtaining a market return on their investment. As a result, housing shortages and deterioration in the quality of housing always follow rent controls.[16]

I saw this in Sweden. After 30 years of Swedish rent control, the effects of their interference with the market are apparent. A Swedish law professor I met at a professional conference in Stockholm explained how he had just leased quarters for his 3-year old son to use as a bachelor apartment when he enrolled at the university 15 years later. "Will you rent it in the meantime?" I asked him. "Oh no, I can't do that," he explained, "since our landlord-tenant law makes it virtually impossible to evict a tenant." "Fortunately," he continued, "our rent control keeps the rent so low I can afford to hold the apartment vacant for about 15 years just to have it available when my son needs it." Sweden has a bad housing shortage, as you would expect. But, as always, the needs of those who have close ties to the government bureaucrats are well met, and it is the common people who suffer under the government controls that purport to be for their benefit.

The operation of my principle that a "bad law is more likely to be supplemented than repealed" also explains the strong current trend toward socializing major segments of our economy. In brief, the trend works like this: First, a law or government program or agency interferes with the free market in a particular industry, justifying its interference by reference to some abuse or catastrophe like a depression. In time, this government interference with the market causes less efficient allocation of resources and more conditions that merit complaint by consumers. Soon, well-meaning reformers propose government assistance or regulation as the best remedy for ills in the industry. For example, when rent control produces a housing shortage, the government solution is public housing and other tax-supported competition with and regulation of the private housing industry. With government intervention come further difficulties until, in the end, the government proposes to take over the entire industry in order to save it. That sequence of events can be seen in various stages in many major industries in the United States today.

In this strange sequence, the government interference that made the industry sick is proposed in larger doses as the means of making it well again. By this means one bad law supplements another. I know of no instance where the original bad law has been remedied by repealing it and getting back to the free market that has been responsible, more than any other single cause, for the fact that Americans have traditionally enjoyed the greatest political freedom and the highest standard of living of any people in the world.

Government intervention in the market can also provide a pretext for government interference with individual freedom. Consider the example of health care: As long as an individual is primarily responsible for his or her own welfare, bearing the burden of any personal activities that are likely to increase its cost, such as smoking, overeating, reckless recreational activities, and the like, there is no basis for the government to restrict persons in the exercise of their individual choices. Individual high-risk activities impose no cost on other individuals, nor on the government. But once the government assumes responsibility for all health care in the society — as it is doing under the type of socialized medical care toward which we are moving — any high-risk individual activities automatically affect the cost of health care by the responsible government agency and by taxpayers generally. In that situation, anything an individual does to increase the risk and cost of his or her personal

health care is of concern to others and provides a theoretical basis for government regulation. By this means government social welfare programs provide a rationale for more government interference with individual freedom.[17] Even in this way a bad law is more likely to be supplemented than repealed.

My reflections on this second principle have also produced a related hypothesis, which, although not fully tested, is offered here in a preliminary way, for whatever illumination it may afford. This hypothesis suggests a vital defect in a representative democracy that is increasingly relying on government by agency decree: *elected lawmakers reserve credit and delegate blame.*

Like many of us in our private activities, lawmakers tend to be specific about what is welcome, and vague about what is unwelcome. When a law is generally hailed as a great accomplishment, elected lawmakers are resolute about shouldering responsibility for the accomplishment. But the blame for bad laws is generally delegated to the bureaucrats who wrote the regulations. If a lawmaker gets a letter from a voter, he answers it; if he gets a complaint from a *taxpayer*, he refers it to an agency.

One of the most disturbing recent trends in law-making is Congress' tendency to pass vague pronouncements in favor of virtue or in opposition to sin. By this means Congress abdicates its responsibility to formulate specific laws, leaving that function to a regulatory agency. That is what the Congress did in outlawing sex discrimination in Title IX of the Education Amendments of 1972, giving the government regulators 36 words of general condemnation of sex discrimination, on which H.E.W.'s Title IX sex discrimination regulations erected approximately 36,000 words of specific prohibitions. For example, Congress was entirely silent on the amount or type of "federal financial assistance" that made private organizations subject to the Title IX regulations. The law on that vital subject was decreed in the regulations.

The same abuse is evident in the Rehabilitation Act of 1973, which contains five lines condemning discrimination against the handicapped, with no legal definition or legislative history to define the "handicapped" who were the subject of the law. The law was decreed in the voluminous regulations recently issued by an executive agency.

Martin H. Gerry, director of H.E.W.'s Office of Civil Rights and hardly a natural foe of the bureaucracy, described and criticized this process in these words: "As these 'sense of the Congress' statutes have replaced the more meaningful law-making activities which surrounded the passage of Title VI [of the Civil Rights Act of 1964], the real law-making requirements, of course, have been shifted to the department." He called this "a serious problem in terms of the separation of powers."[18]

By writing relatively meaningless laws and effectively delegating the law-making function in this manner, an elected lawmaker can escape having to vote on hard questions like the definition of "handicapped," the exceptions to be made to a law outlawing age discrimination. Those vital law-making decisions are left to bureaucrats who rule by decree, largely in secret, and without responsibility to the electorate. As for the elected lawmaker, he can claim credit for the good results but use the Halls of Congress to disclaim responsibility and condemn the bureaucrats for interpretations that prove bad or unpopular.

*III.*

The third of my three principles of law-making and public administration is that *social legislation cannot repeal physical laws.* This deceptively simple principle cannot be taken for granted, since so many persons apparently disbelieve it, or act as if they did. People are generally too susceptible to gimmicks like the energy conservation measure of the dowager who only plugged in her electric clock when she wanted to know what time it was. When Congress passed the law establishing Daylight Savings Time, it changed the time when the sun came up and when the cows gave their milk. But we do well to remember that this law did not change the sun or the cows. It only changed the clock. This simple fact is not understood by persons who believe that social legislation can change physical laws. Thus, a friend told me that when Arizona was considering Daylight Savings Time, some citizens in his neighborhood in Phoenix signed a petition opposing Daylight Savings Time because the extra hour of sunshine would burn up their lawns.

President Carter recently proposed what he called the Hospital Cost Containment Act of 1977. This law would, in effect, put a ceiling on the prices hospitals could charge their patients. It should therefore be titled the Hospital Revenue Limitation Act. But if one were determined to title it in terms of its effect on patients in some situations, it could just as well have been titled the "Hospital Quality Reduction Act." Assuming a well-managed hospital that is not in a monopoly position — a frequent but of course not invariable situation in today's health-care market — there is no way to limit the price hospitals can charge without reducing the quality of services they provide. If hospital prices are frozen or held below market levels, the only way hospitals can operate existing services and build facilities for new ones will be to use more and more government assistance. As noted earlier, the effect of such increased government assistance will ultimately be to destroy the private sector of hospital care in our society, giving government a monopoly on hospital ownership and management. That is the inevitable trend promoted by the so-called Hospital Cost Containment Act.

We don't need more sophisticated principles. Basic arithmetic and common sense will do. Sometimes we

seem to make some of our most important political and economic decisions on the same primitive level as the Florida draft board wrote a young man to explain why he had lost his student deferment and been classified 1-A: "To keep your deferment you must be ranked in the top two-thirds of your class, and you are only in the top one-fourth."

In the area of social welfare legislation, my third principle is clearly illustrated by reference to its primary corollary: *Law cannot increase resources.* Congress can pass a law freezing wages and prices or devaluing currency, but it cannot pass a law that will bring about an increase in the true gross national product of the nation. That is why the Great Society's "war on poverty" had to be a war on taxpayers as well. In this pair of wars it was inevitable, as Parkinson noted, that the war on taxpayers would be the easier war to win.[19]

Social planners cannot be reminded too often than an overall growth in the economy is a sounder means of abolishing poverty than a redistribution of capital or income. The sum total of all resources in the hands of the wealthiest fraction of taxpayers in this country would be insufficient to make any practical dent on poverty even if all of those resources were confiscated and given to the poor. British planners had to learn this lesson. After more than a generation of promoting the myth that you could tax the rich in order to provide social welfare benefits for the poor, the Labour Government conceded last year that this wouldn't work. Wealthy Britons already paid some of the highest taxes in the world, with marginal rates up to 83 percent on earned income and 98 percent on unearned income. If the deficit-ridden government now confiscated all British incomes in excess of $10,000 per year this would provide less than 1 percent of the government's current budget, which is far less than its continuing deficit.[20]

The taxes necessary to support social welfare programs obviously have to come from the working middle class. But, as the working man's taxes go higher and higher, and as generally available social welfare payments get more and more generous, a worker has less and less incentive to work. Even the British Labour Government was brought to that conclusion. Denis Healey, Chancellor of the Exchequer, conceded during last year's financial crisis that British taxes had reached the point where they were "corroding the will to work." It made more sense for the average British worker to stay home and collect unemployment pay than to work and pay taxes.[21]

All the Acts of Congress, all the rhetoric of bureaucrats, and all the assurances of the Keynesian economists do not seem to make even a tiny modification in the laws of human nature and resource allocation on which the functioning of the market is based. There are social welfare legislative schemes that attempt to increase resources or to repeal physical laws, but typically all they produce is a bad side effect, like the pill that was supposed to make a middle-aged user look like a teenager again. It did: three doses and his face broke out.

And so I have given you my three principles of law-making and public policy: (1) *Law expands in proportion to the resources available for its enforcement;* (2) *bad law is more likely to be supplemented than repealed;* and (3) *social legislation cannot repeal physical laws.*

In my exposition of these laws I obviously have made no effort to conceal my bias against law-making as the solution to every problem. I am not indifferent toward the abundant problems of our society, but only convinced that voluntary is always better than compelled — that the momentum of enlightened self-interest is always better than the compulsion of law. Inherent in our free enterprise system are the natural forces to correct most of its internal irregularities, although these correctives are sometimes slow and unpopular. But free enterprise has no corrective for excessive interference from government. It can only tolerate that interference and pass its cost along to consumers. In time, that cost can rise so high that our people may reject free enterprise because of grievances that should be charged to excessive government interference.

I hope that the love of freedom and the good sense of our people is sufficient for us to provide correctives for excessive government rather than to reject free enterprise. Only by the patient revolution of free enterprise can we be assured sufficient freedom and sufficient resources to find largely voluntary and permanent solutions to the problems that confront our society.

*FOOTNOTES*

[1] Parkinson, *Parkinson's Law*, pp. 11-12 (1968).

[2] Parkinson, *The Law and the Profits*, p. 9 (1968).

[3] Parkinson, *The Law and the Profits*, p. 18 (1968).

[4] The process is analyzed in Etzioni, *Modern Organizations*, p. 10, (Prentice-Hall, 1964).

[5] Parkinson, *The Law and the Profits*, p. 18 (1968).

[6] Shenfield, *The Myth of Social Policy*, p. 15 (1975).

[7] *Utah Taxpayers* Sept./Oct. 1977, p. 3.

[8] Bloch, *Murphy's Law and Other Reasons Why Things Go Wrong* (forthcoming book), referred to in *Deseret News*, Sept. 12, 1977, p. 1C.

[9] Labovitz, "The Impact of the Private Foundation Provisions of the Tax Reform Act of 1969," *The Journal of Legal Studies*, Vol. 3, pp. 63, 78, 81 (1974).

[10] Suggested by Arthur Bloch, note 8 *supra*.

[11] "The Cruel Cost of the Minimum Wage," *New York Times*

(editorial), Aug. 17, 1977, p. 30; "Professor Opposes Minimum Wage Law," *Desert News*, Oct. 19, 1977, p. 10A (comments of Dr. Walter Williams, UPI story).

[12]"$2.65 Minimum Wage May Cut 90,000 Jobs." *Salt Lake Tribune*, July 29, 1977, p. 4A (UPI story).

[13]"Out In Front," 63 *American Bar Association Journal*, 298 (1977).

[14]Martin Anderson, *The Federal Bulldozer*, p. x (1964).

[15]John C. Weicher, *Urban Renewal: National Program for Local Problems*, pp. 2, 6-7 (1972); Bruce L. Jaffee, "What Happened to Urban Renewal?" *Business Horizons* Feb. 1977.

[16]Shenfield, *Myths of Social Policy*, p. 24 (1975).

[17]Pasour, "Victims of Reform Laws," *The Freeman* April, 1977, pp. 207, 210.

[18]Gerry, "Civil Rights Regulations — Hindsight and Foresight," in *Private Higher Education: The Job Ahead*, vol. 5, pp. 11-12 (American Association of Presidents of Independent Colleges and Universities, 1976 Annual Meeting Talks).

[19]Parkinson, *The Law and the Profits* p. 48 (1968).

[20]*New York Times*, Feb. 20, 1976, p. 6; *Economists*, [of London] Feb. 21, 1976, p. 69.

[21]*New York Times*, Feb. 20, 1976, p. 1; Feb. 21, 1976, p. 7.

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AMERICAN ASSOCIATION OF PRESIDENTS
OF INDEPENDENT COLLEGES AND UNIVERSITIES
and
SCOTTSDALE CONFERENCE ON CHURCH-RELATED
HIGHER EDUCATION

December 1, 1977

## LEGISLATIVE POLICY ON STATE AND FEDERAL REGULATION OF HIGHER EDUCATION

1. Government regulation of higher education should be restricted to areas in which government has a legitimate government interest to protect, such as:
   a. to insure that government funds are expended for the purpose for which such funds are provided;
   b. to insure that government funds are not expended in ways which are inimical to legitimate government objectives; and
   c. to make certain that government property and facilities acquired with government funds or financing are used without unlawful discrimination and in other respects consistent with applicable law.
2. Laws and regulations affecting education must be written so as to protect and minimize interference with the stated purposes and academic freedom of state and independent colleges and universities and their personnel. In order to strengthen our pluralistic system, such laws and regulations should distinguish, where appropriate, between state sponsored and independently sponsored institutions. In addition, the constitutional freedoms of those independent institutions controlled or sponsored by churches should always be honored.
3. Government regulation based on the receipt of financial assistance by an institution of higher education should be limited to the programs directly assisted and appropriate to both the level and duration of support provided.
4. Government regulation of an institution of higher education should not be premised upon the receipt of government financial assistance by its students.

The Scottsdale Conference on Church-Related Higher Education is an informal association of the chief executive officers of church systems of higher education, together with presidents of church-related colleges and universities. The 1977 Conference consisted of 25 presidents and four chief executive officers representing over 100 other institutions. The chairman of the Steering Committee for 1978 is Fred E. J. Harder, Executive Secretary, Board of Higher Education, General Conference of Seventh-Day Adventists, 6840 Eastern Avenue, N.W., Washington, D.C. 20012.

The American Association of Presidents of Independent Colleges and Universities is a membership association of 114 presidents of independent colleges and universities in 36 different states. The president for 1978 is Dallin H. Oaks, President, Brigham Young University, 1130 ASB, Provo, Utah, 84602.

Hal Visick

# New and Proposed Federal Legislation

by Hal Visick

General Counsel and Assistant to the President
Brigham Young University

Hal Visick is General Counsel at Brigham Young University, where he obtained his B.A. degree. He has his J.D. degree from George Washington University. Attorney Visick is a member of the Bar in California, Michigan and Utah.

Tax reform under the Carter administration generally means tax increase. Under the guise of achieving greater tax equity, several proposals have been made. It appears to me the Treasury Department has now been captured by the "tax expenditure" people.

These people espouse the philosophy that the same tax rate ought to be imposed on everybody uniformly and that there should be no deductions. They claim the exciting deductions are the equivalent of government expenditures. For example, if someone makes a contribution to your University and then takes a tax deduction, thereby reducing his taxes, their theory would be the government should have received that tax money. They reason that therefore the individual has spent government money to support your institution.

I have here a series of papers which were obtained from the White House by clandestine means. These papers were provided to the President to explain the Treasury's tax proposals. I have here in hand an analysis of individual tax expenditures for fiscal year 1977. This is the amount the government is allegedly losing because of deductions.

The tax expenditure concept makes no sense to me. The idea that if the people's representatives choose not to collect taxes, the amount uncollected are an expenditure by the government, boggles my mind. That's equivalent to the government being entitled to the entire gross national produet. Whatever it leaves in the hands of the people is just a kindness; the government is really entitled to spend it all.

I have a chart which shows how much tax would be collected by the government if the various deductions were eliminated. These figures are based on the assumption that taxes make no differences in personal financial planning. The planners conclude that if property were not given to charity, the owner would sell the property and pay taxes on the proceeds. The planners do not imagine that the donor will retain the property and continue to receive its earnings and appreciation.

These two assumptions: (1) that charitable contributions and other deductions are expenditures by the government and (2) that increased tax costs do not affect financial planning, underie many of the tax reform proposals. Since I believe both assumptions to be wrong, the estimates of increased revenue are subject to challenge.

## TAX REFORM

There is no question that the proposals would have a profound effect on a charitable giving. Professor Feldstein of Harvard University has developed a mathematical model based on giving patterns over the last several years, the most recent year included is 1974. He has plugged in most of the tax reform proposals and has come up with estimated decreases or increases in charitable giving for each proposal. Feldstein concludes that giving to higher education is far more sensitive to changes in the tax laws than is other charitable giving. For example, giving to churches apparently will remain relatively constant even at considerable tax cost. The large donor, who is the primary giver to higher education, is extremely sensitive to changes in tax law. Many of these large donations could be lost if some of these changes I am about to mention are enacted. President Carter has rejected many of the Treasury proposals and has asked the Treasury to revise them. The President is not prepared to send his tax reform proposals to Congress before late winter or early spring. Therefore, some of the proposals I am about to discuss may not be offered.

Now, let me describe some of the Treasury proposals. The Treasury proposes to eliminate special treatment of capital gains. This has an indirect but powerful effect on gifts because most large gifts consist of appreciated property or stock. It is proposed by the Treasury that capital gains will be taxed as ordinary income. This change, taken by itself, could

have a favorable effect on charitable giving. Professor Feldstein has demonstrated that an increase in the marginal tax rate will increase charitable contributions. This would be true if the charitable contribution deduction remains unchanged.

Along with this proposal, there is a proposal to change the rules concerning charitable contribution of appreciated property. The Treasury argues that eliminating the capital gains tax would produce a windfall to charity because more owners would contribute rather than sell their property to avoid high tax rates. The Treasury proposes to reduce the charitable deduction on appreciated property (presently full fair-market value) to cost plus one half the appreciation in value. For example: if a donor paid $1,000 for property now worth $10,000, the donor would be allowed to deduct his $1,000 plus one-half of $9,000 appreciation or $4,500. His total deduction would be $5,500 but he will have given $10,000. This is the present rule for donations to private foundations. It has completely eliminated gifts of appreciated property to private foundations. There is a great deal of opposition to this. I understand that President Carter is not planning to recommend this proposal.

I believe the Feldstein study shows that this proposal would reduce contributions to higher education by 47%. This would be a disaster for those of us who depend upon private donations. Enactment of this proposal would force more people to depend on federal subsidy and would tighten the spiral of federal control over education.

The proposals I have just described are probably the most important in terms of their effect on charitable giving.

Question: Should we take some action to oppose these proposals at the present time?

I don't think contact with Congress would be appropriate at this time. It seems to me such contact would be more appropriate if these proposals are sent to the Congress.

Here are some other proposed tax changes which may have direct or indirect effect on charitable giving to colleges and universities. The treasury proposes to change real estate depreciation deduction rules to limit deductible depreciation to the straight-line method. Under this rule, if you had a piece of property with a 40-year life you would deduct 1/40th of the value each year as opposed to the accelerated depreciation methods now available. This proposal would increase the cost of holding property. Our experience with donors who wish to give property to the university is that they often want to recover their cost. In this case they may contribute to the university, say a 50% interest in the property and retain 50%. When the property is sold the donor gets back his original cost. If the donor cannot use accelerated depreciation his cost of holding property increases. Therefore, the proportion of the property he must retain is larger and the proportion he gives will be smaller.

The Treasury also proposes to reduce the number of itemized deductions available. These include eliminating deductions for sales taxes, for personal property taxes, and for gasoline taxes. When these features were originally put into the code the purpose was to prevent paying a tax on a tax — the theory being that it was really not fair for you to pay income tax on money that you were already paying to the state government, for sales and gasoline taxes, etc.

I believe the purpose of this proposal is to try to persuade more people to use the standard deduction. Certainly the number of persons who can profitably itemize will be reduced. These proposals will raise the number of persons taking the standard deduction to 83% from the present 75%. People who take the standard deduction get no tax benefit from charitable deductions and, therefore, receive no tax incentive to make them.

Furthermore, the populists then argue that the charitable deduction favors the rich since only the well-to-do itemize. They ignore the fact that those who take the standard deduction receive credit for contributions, taxes, etc., which they have not made. Some legislators have proposed giving a tax deduction for all charitable contributions whether or not the taxpayer itemizes. I leave to your judgment whether this is a wise proposal. It would certainly broaden the incentive for giving.

Another proposal, concerns fringe benefits. This affects us directly. The Treasury proposes to reduce the tax-free insurance you can provide for your employees from $50,000 to $25,000. Of course that means if you provide employees a $50,000 policy, then they will be taxable on $25,000 of that $50,000 policy. This is part of the general attack the Treasury is making on tax-free fringe benefits. This attack has stalled for the moment. The House Ways and Means Committee has passed a resolution instructing the Treasury Department not to issue any regulations on the subject of fringe benefits until the summer of 1978. This will give the House a chance to look at the problem before the Treasury acts.

The Treasury also proposes to change the retirement contribution law but I doubt if it will affect too many of us. The proposal restricts retirement contributions to $15,000 a year per person or to an amount which will produce a $60,000 a year retirement benefit.

If you have a credit union on the campus, there is a proposal to tax credit unions on their income. In the past, credit unions have not been taxed. Now the Treasury proposes to treat credit unions like banks so that the banks won't complain about credit unions getting favorable tax breaks.

Another interesting point is that the Treasury proposes that banks, credit unions and all payers of interest withhold 20% of the amount of

interest and remit it to the Treasury as is now due with wages. I expect this would probably apply to charitable trusts and pooled income funds.

Another proposal which the Treasury does not recommend but has been relayed to the White House is that a tax be imposed on annual increases in value of insurance and annuity contracts such as TIAA contracts. As you know at present when you contribute to TIAA programs there is no current tax on the increase in value. You pay income taxes when you begin to collect the benefits. The Treasury proposal is that each year you would receive a statement from TIAA saying that your annuity increased in value by $800. You would then have to include that amount in your income and pay tax on it.

The Treasury proposes to change the personal exemption from a $750 deduction to a $250 tax credit. The effect of this proposal is to decrease taxes for the lower end of the income spectrum and to increase taxes for higher income persons. If you are in a bracket above 33% the value of the personal deduction will be reduced. There are people in Washington who think that tax equity is better served by credits instead of deductions because, they say, everybody ought to be treated the same. What they're really saying is that persons with lower income ought to be given greater benefits — the idea will introduce greater progressivity into the tax structure.

The Treasury proposes to reduce the tax rates from the present 14% - 70% to 12-50% but that would be offset by tax increases, some of which I have mentioned above.

Another proposal that would affect us is that of taxing scholarships and Veterans Benefits. The Treasury proposes to tax as income, all such benefits in excess of the cost of tuition, books and fees. This may not have a tremendous effect because a couple must earn $6,000 under the present law before any tax is due. Nevertheless, the proposal does depart from a concept that has been in the tax law for many years. Further increases may occur once the concept has been abandoned.

This development makes no sense to me. The government should not spend money to collect taxes to pay benefits and then collect taxes again on those benefits. Every time the money goes through the hands of the government, it is reduced by the costs of collection, distribution and policing collections and expenditures. There may be nothing left of the taxes by the time it goes around a few times.

There was a semi-serious move to include government employees (not congressmen and senators) and charitable institutions in the social security system in the last Congress. As you know, charitable institutions now have the option of not being covered by the social security system. I expect the increased rates which were recently enacted will cause some charities to try to withdraw from the social security system. You have to give two years' notice in order to withdraw. I expect during that two years, the Congress probably will alter the law to include charities.

I saw an interesting article in last month's *Fortune Magazine* dealing with the unfunded pension liabilities of the United States including obligations of private industry. These liabilities are in the trillions, and the money to pay for them has to be collected somehow from private industry, only industry producing wealth to tax for these liabilities. I doubt that very many people realize the size of this deficit.

The increase in social security taxes is only a minor symptom of the attempt to cover this unfunded liability. One of those huge unfunded liabilities is the pension plan for government workers. Government workers contribute and their money is invested to cover a part of the liability, but the government is covering the liability for its shares out of future earnings.

You can see what happens if your pension investment is unsound and failure occurs, then the company or city or state is liable for the pension it has promised. I expect there will be major deficits in some pension funds and many people will not receive what they anticipated. There is no conceivable way in my mind that the entire burden can be discharged by private industry.

## COPYRIGHT ACT

Let's look briefly at the Copyright Act. I am not sure we were very alert when this Act was proposed. There are some exceptions for charitable activities but now that we are starting to apply the Act, we are beginning to see that it is going to put us to a lot of expense and may expose us to possible litigation. I should point out to you that in the Federal Register of November 16th, the Copyright Office has issued final regulations which will be very important to you. The regulation requires you to display a warning near all your copying machines and wherever you take orders for copies.

Basically, the Copyright Law has tried to codify something which has been in the Copyright Law for years as a judicially engrafted exception – "rule of reason" which permits limited copying which would not unfairly deprive the author of royalties. For example, you decide you want to use one poem out of a larger work which you would not ordinarily consider requiring students to buy for that one poem. Under those circumstances, you may copy the poem only for classroom use. These exemptions are now spelled out in the law. Basically, the idea is that you can use limited copies for study but not for any commercial or permanent use. You can make a certain number of copies for a given class, but you have to destroy them or encourage people not to make them a part of their permanent files.

Another aspect of the new Act — and this is where I think we really got

clobbered — is that the old charitable exemption for music performances is totally eliminated. I admit I never knew about this aspect of it during the time that the Copyright Act was being proposed. We were all concentrating on the copying exceptions, things that would help us in teaching our classes. But the big licensing companies, BMI and ASCAP were pushing this very hard. The new law eliminates the old charitable exemption. Under prior law any music performed on your campus was exempt from royalties.

There is little chance of getting this changed. These companies have lobbied for this bill for ten years and I don't think we are going to be very successful in getting it changed overnight.

There is a minor exception in our favor, you may use copyright music for teaching purposes on the campus without paying royalties. If you have hired performers, you are liable for license fees on every copyrighted piece of music performed.

The BMI and ASCAP interpretation of the law is that if there is any charge made for admission, you must pay. They are arguing that if you charge admission at your football games and the band marches at half-time, you have to pay fees on all their music.

For example, BMI licenses 2 million copyrighted pieces of music; ASCAP might be a little larger than that. They are negotiating with ACE and others in an effort to work out a standard license for college campuses. BMI's proposal — and it's the only one that has yet made a formal proposal — is that there be a charge of $0.10 per student, per year which would cover all incidental use of music. Then they would charge you for concert halls on a per concert basis. For example, our students like to stage concerts in our 23,000 seat basketball arena. The charge for that under the BMI proposal would be $250 per concert. We also have 7 or 8 other concert facilities on the campus. I suppose we would have to pay a license fee for each of them. My estimate would be — since we are a large institution — for licenses with all three corporations would be in the range of $1.00 per student.

I suppose any college is free to negotiate with these people if it wishes. However, I think what is going to happen is that some kind of a national license will be hammered out by ACE and will be offered on a uniform basis by the licensing organizations. ASCAP, for example, would mail us the materials on a take-it-or-leave-it basis.

## SOCIAL SECURITY

As you know, both the House and the Senate have passed social security bill and there are substantial differences between them. The House bill retains "parity", it has the same tax rate for the employee as for the employer. The House bill has a ceiling of $42,600 which is reached in 1986. The House rate rises slower but gets to the same place as the Senate rate in 1986. In 1986 the rate will be 7.1%. A 7.1% on wages up to $42,600, the employer will be paying the same amount. People who are in the maximum bracket will be paying more than triple what they now pay.

Benefits are tied to contributions and will increase in future years. You would have to be an optimist to imagine that the social security system is going to survive bankruptcy and provide benefits of any significance to workers now entering the system. Only an enormous transfer of general revenue to the social security system would appear to be a possible solution. With inflation continuing at the present, I expect that nearly every full professor will be paid at least $42,600 by 1986 so by that time a lot of people will be paying taxes at the maximum rate.

I think parity will be maintained for the immediate future because the House is very strongly in favor of this feature. However, I mentioned yesterday that the Senate has prevailed historically in conference committees about 80% of the time.

*Question: Do you have any estimate when the next significant change will come in social security? Some of us are in the process of preparing budgets, particularly in the salary area.*

In my opinion whatever bill passes will probably govern for the next three of four years and will be effective next year.

*Question: Are you saying they would not affect teaching contracts for 1978-79?*

No, I think it will. In my opinion the bill will be passed in the next couple of weeks. I certainly would build into my budget, a factor for increased social security taxes. Next year's increase will not be too large . . . not compared to what they will be, later.

**The minimum wage is going up to $3.35 by 1981 and you need to put that in your budget as well. The 85% student differential is retained in the new law.**

**I did not mention the Danforth Amendment which has at least some chance of passing, I suppose. This is a feature of the Senate bill. It would** reduce social security taxes after the year 1979 by 10% if they are paid by a 501c(3) type organization. This would include all of us. I have mixed emotions about singling charities out for special treatment because the "tax expenditure" advocates will say we have done you a favor, now we will regulate you. Nevertheless, the amendment will be quite popular among the colleges and universities, I think it has some chance of passing. It has a good deal of support by Senators on the conference committee. It has a great deal of opposition in the House. The House members feel college professors are like anyone else and ought to be treated the same.

*The Social Security and Retirement bills are almost identical in the concept that they are putting in a special exception for universities and the House is trying to take it out.*

The House does not accept the idea that colleges and universities are unique and should be treated differently. The theory behind the Social Security difference is that charities don't get to deduct taxes as a

business corporation does. They, therefore, cannot recover a portion of the tax. Most college budgets add the employer's share of the social security contribution right on to the salary schedule. A decrease in the employer's share of the tax increases the amount available to pay salaries.

**LITIGATION**

I am going to leave legislation for a minute and call your attention to a lawsuit. There has been a lot of agitation and some successful litigation on the theory that men and women are being treated unequally because retirement benefits are lower for women than men based on life expectancy tables.

Insurance companies and retirement annuities have always treated men and women differently because the tables indicate that women generally outlive men.

A woman at 65 would have a 4½ to 5 year longer life expectancy than a man of the same age. Employers have in the past made equal contributions for men and women. However, the women get a lower monthly benefit when they retire because the payments will continue over a longer period of time. Some of the women's organizations insist that equal contributions must be made and that equal monthly benefits be paid. In other words, we must contribute the same amount for men and women but we must also somehow arrange the table so that the men and women get the same amount of money each month. The effect of that is to pay women more money over the period of their life expectancy than men over the period of their life expectancy. A case has been decided in California, the Colby College case, which held that the federal equal pay law is controlling in this area over the antidiscrimination acts. The Equal Pay Act requires that equal contributions be made. Furthermore that the difference in monthly benefits based on life expectancy is lawful and does not violate Title IX or any other civil rights law.

A so-called Labor Reform Act (HR-8410) has been passed by the House. Most of us don't have unions and, therefore, I am not going into the details of the Act. Essentially what it does is make it easier to organize a union and makes the punishment for "failing to bargain in good faith" far heavier than it once was.

*Question: What are the chances the Act will pass?*

I think it will pass easily. There will be a lot of lobbying against it. A filibuster may occur. I think it will be a much closer vote than it was in the House which was something like 250 to 147. But I think it will pass. I know the ACE, NAICU, and others are trying to change it. Most industry lobbyists are doing everything they can to head it off. Mr. Meany and his friends have decided to put all their chips on this piece of legislation.

**COLLEGE TUITION RELIEF ACT**

Incidentally, attached to the social security legislation is the College Tuition Relief Act. This would give those who pay tuition a $250 tax credit for each child in school. Most colleges have mixed emotions about the credit. I don't know if it is a good or bad proposal. There are apparently strong feelings throughout the country that tuition has become such a terrible burden that the middle class must have some relief. There is a lot of support for that idea in Congress. Six months ago, I would have said there was no chance of this passing, but now there is a good chance it will pass. Whether this will be good for colleges or bad, I don't know. There is a fear among most college administrators that Congress will treat th Act as a benefit to the institutions rather than individuals.

## THE POSITIONS OF AAPICU

The purposes of this Association have sometimes been misunderstood, occasionally by its own members and almost invariably by others. "They are a reactionary organization against federal aid," is the epithet heard. This damning misunderstanding must be corrected.

The purpose of this Association of *Presidents* (not an organization of *institutions*) is to promote the *independence* of private higher education. The most significant current threats to such independence come from government, but our concerns reach every other threat to the academic freedom of the institutions we lead.

All types of institutions are represented in our membership: large universities, urban and rural, and small colleges, independent and church-related.

The official positions of AAPICU are not stated by individual members, or even by association officers unless specifically authorized. The Association takes its positions through resolutions of the membership at its annual meeting, or through the action of its Board of Directors.

We have no association bias against direct or indirect government assistance to private higher education, but we are committed to minimizing the government controls predicated upon such assistance. We are also committed to minimizing the government controls predicated upon such assistance. We are also committed to reducing generalized government regulation of higher education when we deem that regulation an inappropriate infringement upon the freedom that colleges and universities must have in order to perform their task or when that regulation threatens the economic life of this vital portion of the private sector.

AAPICU member presidents and the institutions they lead have many different positions on educational issues and public policies. What unites us in this organization is a common desire to preserve the *independence* of our private sector of higher education. We invite all to join in that effort.

Dr. Dallin H. Oaks
President

Dr. Jim Sullivan

# "Bethink You That You May Be Mistaken"

## The Impact of State Laws and Regulations on Independent Higher Education

by Dr. Jim Sullivan

Vice President
National Association of Independent Colleges and Universities

Dr. Jim Sullivan is Vice President of the National Association of Independent Colleges and Universities, Washington, D.C. He was President of the Northwest Association of Private Colleges and Universities from 1972 to 1976. Dr. Sullivan has taught political science at Lewis and Clark College, has been a member of the executive board, the Task Force on Financing of Higher Education, Association of American Colleges (1972-75); member of the advisory committee to the USOE/ACE Study of Small Private Liberal Arts College (1975-76) and Special Assistant to Congresswoman Edith Green, Chairman of the House Subcommittee on Postsecondary Education, while Congress was considering the Higher Education Act of 1972.

It is a delight and pleasure for me to be here with you today, but it is also a challenge to me to attempt to adequately cover the subject of the states and independent higher education in a brief presentation such as this. For one thing, the history of that relationship is so long, extending back as it does to that time when, as one person only half facetiously remarked, "Harvard was public — and Massachusetts was private."

In spite of the kernel of truth in that remark, the truth of the matter is that, for most of the history of independent colleges in America, we have had only a bare minimum of contact with the states.

We tended to be incorporated under the laws of the states because we operated as corporations.

We were exempted by the state from many taxes because we were connected with a recognized religious body, or because the state granted exemptions to valid educational institutions, or both.

Our authority to grant degrees came from the state in most instances.

With those few exceptions, we went our separate ways, the states governing and the independent colleges and universities educating.

When I think of that long and illustrious history I am reminded of something that all of us know in the back of our minds, that long before there were state system colleges, long before there were land grant colleges, long before there were community colleges, long before the states were even concerned about higher education; it was the independent colleges and universities of America who alone carried the burden — and the glory — of educating Americans at that college and university level.

I think back on that history from time to time and I am always struck by the incongruity of the thinking of those who today seem so concerned about the dire threats they see in church-related colleges teaching the youth of America. I would remind them of that long period when no one except the independent colleges were willing to teach the post-secondary age youth.

Enough of that.

For well over a century, then, the states did not intrude upon the independent colleges and universities and we had no special reason to turn to them. Most of our institutions were founded by religious bodies, or other voluntary associations of like-minded people, and they were financed by a combination of funds from the founding group, from tuition and fees, and from charitable giving. It was in many ways a difficult role, but it was an uncomplicated one.

During this time, however, there was one basic change in this equation that foretold some of the complications to be. The states began to establish, slowly but steadily, state-controlled colleges and universities — and to subsidize them with what amounted to non-need based FTE grants which kept the tuitions at these institutions

artificially low. At that time the tuition differential between the independent institutions and the state-supported institutions was not great, but the seed had been planted.

That tends to be a brief, over-view history of the relationship between the states and independent higher education up until well into the 20th Century. Like so many changes and problems we face today, the altered relationship between the states and the independent institutions are a product of recent years and recent changes.

I would like therefore to discuss with you some of the changes that I perceive to have happened in recent years, and perhaps predict some that may well happen in the forthcoming years.

One, the coming of the community colleges. In a matter of a few short years — in some states it almost seemed to happen in one fall swoop — the state-supported institutions of higher education doubled, and sometimes tripled, in number. It seems to me that the coming of the community colleges changed the existing equation in at least three different ways. For one thing, they tended to be spread out widely over the states and frequently were located in or close by small communities that had historically been served by an independent college. Many of our institutions were faced for the first time with "home town" competition. Second, the tendency has been, partly because these community colleges generally receive public monies both from the state and other local taxing district, for them to have tuitions even lower than the state-supported four year colleges and universities. It is not at all unheard of to have annual community college tuitions in the range of $200-300 a year. Finally, the sudden coming of that many additional higher education institutions couldn't help but further cut up the potential student enrollment pie. Granted that some of the students who attended community colleges might not have attended any other type of higher education institution; it is still true that all of these additional institutions couldn't help but drain off some of our pool of potential students.

That example of a change was the result of deliberate and specific state decisions and actions. The second example grows out of a factor almost totally beyond the control of the states, but it is their reaction that is important.

Inflation. Inflation is not something totally new to the American scene, but I am here concerned with the inflation that hit all of America — and most especially the higher education community — in the late 1960's and has pretty much continued right up until today. As you know only too well, the costs of higher education skyrocketed, in both the state-supported and the independent sectors. The difference is that in the state-supported institutions the states made a deliberate decision to continue to pay a major portion of the inflation factor, while in the independent institutions much of that added cost was of necessity passed on to the ultimate consumer, the students and/or their parents. The tuition differential broadened, and broadened, and broadened, until today it is not unusual for the tuition price at some independent colleges and universities to be from two to four thousand dollars higher than at competing state-supported institutions.

I can still remember the situation in my state of Oregon in the late 1960's. As fast as we increased tuitions, costs to us went up faster. Endowments that had taken decades to build were consumed before our eyes in a matter of two to five years. Independent colleges were being pushed to the wall financially and, in one year alone, three of the small institutions closed their doors. Long time donors to independent colleges were hesitating in their giving as they wondered if the independent college they gave to this year would be in existence the next year. As the tuition gap widened, our share of the enrollment steadily declined. For a few shocking years not only did our share of the enrollment decline, but so did our actual enrollments. They were years of desperation, not only in Oregon but among independent colleges and universities across the nation.

A number of our people began to think; the states were artificially keeping down the tuitions in the state-supported institutions, the states were a major factor in producing the widening tuition gap. We would turn to the states for assistance, assistance to our institutions, grants or scholarships to our students, perhaps a combination of both. Across this nation independent colleges and universities began to look to the states for financial help.

We have continued to look to them for financial help. We have looked to them to the extent that, in this academic year, 454,815 students enrolled in independent institutions will receive some form of state scholarship grants in the total amount of $407,738,000. Or, to put it another way, a mean average award value of $896 for each of those 454,815 students enrolled in our institutions.

At the same time we have now reached the point where at least some of the states currently fund direct institutional monies to independent colleges and universities in the total amount of slightly more than $160 million this year. We have therefore reached the point where our institutions and our students are collectively receiving more than $610 million a year from the states. I do not know of a single one of our state associations of independent colleges that will be asking for less next year.

These state funds come in many different forms, but they all tend to fall into the two general categories I have mentioned: student aid and institutional support. Under student

aid we find: scholarships and grants, tuition equalization grants not based on need, grants based on need, grants based on merit, grants tied to special programs, loans, contracts, and work/study programs.

Under direct institutional support we find: general or formula-based grants, categorical or specific purpose grants, contracts, loans for construction, and cost of education grants.

Under indirect institutional support we find: aid-in-kind, tax exemptions, tax credits, and bonding authority. None of these latter are included in the appropriation figures I mentioned above.

I think you gather the picture by now. Across this nation hundreds of independent colleges and universities, and hundreds of thousands of students attending these institutions, are receiving hundreds of millions of dollars from the states each year in a multitude of different programs, and the appropriations will almost certainly increase each year for the foreseeable future.

That much is of the here and now. That is how the relationships between the states and the independent colleges and universities have changed, at least as it pertains to finances. What are some of the current trends? What are some of the changes that the future may bring? I would like to turn my attention now to possible answers to those questions.

I will take them up in no particular order, although I will hold what I consider to be the two most serious to the end.

In a number of states we are seeing an attack upon the tax exemptions so long enjoyed by non-profit independent colleges and universities. The attack comes in many different forms. In some states there is an outright attack on the basic assumption of the property tax exemption for non-profit educational institutions. In other states the attack on this exemption is more subtle: the question is raised — sometimes administratively and sometimes legislatively — as to what part of our campuses truly meet their narrow definition of what is the "educational" portion of our enterprise. The dorms? The student union building? The athletic facilities? The parking lots? However it is approached, our property tax exemption is being threatened.

In other states our total or partial exemption from the state sales tax is being questioned. In still other states we are faced with the question of paying an income tax on parts of our revenues. None of these suggested changes in the various states strike at the internal operations of our institutions, as do some of the later issues I will raise, but I think all of you can understand our great concerns about any changes in state tax policy toward the independent colleges and universities and our fears as to what impact such changes would have upon our financial viability.

Another threatening cloud on the horizon is accreditation by the government, and in this instance the threat may come from either the states or the federal government, or both. I think we should be quite frank with ourselves about this problem. Part of the threat may come from the feeling on the part of some people in government that no one else can do the job as well as they. Part of the problem stems, however, from some inherent weaknesses in the accreditation process. The honest fact is that the accreditation process has not worked any better than any other self-policing policy. I would hasten to point out that it has probably not worked any worse either.

There are unfortunately more than enough examples around — and known to people at all levels of government — of colleges and universities that have gained accreditation or kept accreditation when everyone in the area know they were doing sub-standard educational work. There are examples of such colleges in the state-supported sector and there are also examples of such colleges in our sector. I tell you as forcefully as I can that if those of us in higher education do not clean up this problem by ourselves that we are asking for government intrusions and intervention. I simply do not know in that instance whether it will come from the states or the federal government and whether it would be worse if it came from one or the other.

Another quite recent trend developing is the shifting of the responsibilities for the carrying of some of the social burdens from the states to the educational institutions. The federal law in regard to the handicapped is bringing about many of these changes. For the moment so many of us have been so concerned about the large initial financial impact of capital conversions to meet this new law that we have tended to ignore the ongoing implementation costs.

For years it has been the primary responsibility of the state to provide assistance to the deaf and the blind and other such handicapped persons. We are suddenly discovering that when such a person is accepted as a student or employee — we cannot legally reject them on the basis of their handicap — the burden of supplying such special assistance seems to shift from the government to our institutions. NAICU is already involved in the first test case in South Carolina on this issue and we are also working with one of our small independent colleges in Pennsylvania on an allied problem. I would assume that we may well have hundreds and then thousands of such instances in the years ahead. It is going to be an interesting question as to whether the states will get away with totally dumping that financial burden upon the colleges and universities or whether the states will continue to meet their societal obligations as we had always expected them to do in the

past.

One of the other possible clouds on the horizon concerns suggested new laws — and once again they could be either state or federal laws — to outlaw possible conflict of interest between our institutions and members of our boards who may also do business with our institutions. Such laws have already been expanded to cover a number of businesses and institutions who were not formerly covered, and all of the indications are that both levels of government are currently examining the operations of the higher education community in this regard. Once again I would suggest to you that you would be well advised to take strong self-policing action to make certain you protect both your institutions and your board members against any possible new conflict of interest laws, whether they originate with the states or the federal government.

On still another subject, I would report to you that Pennsylvania has already passed a new law, and other states are considering it, to make it mandatory that all federal funds entering the state must be re-appropriated by the state legislature. As I am sure you would presume, there are some very fundamental constitutional questions here, and I do not mean to ignore them. The courts will ultimately decide that part of the question, however, so I would like to concentrate my attention on the political side of the question.

A number of the state-supported institutions across the country are working to gain an exemption for higher education institutions and students if such a law is passed in their states. I think they are going to have a difficult time convincing very many legislators of that because a major part of the problem rests with the track record of many state-supported colleges and universities. These institutions have historically gone to the legislatures and asked for an appropriation to expand some program they were already running or to do something new, and the legislature would turn them down. The next thing the legislators knew, the college or university had gained federal funds for those purposes and the programs were off and running.

The legislators, first of all, ask what that does to their theoretical budget control over the state-supported institutions and, secondly, what happens when the program is in place and the federal money ends? I think we are probably completely innocent of having created any part of the problem, but we may very well be caught in the "solution" if a trend develops for the states to claim the authority to re-appropriate federal funds entering a state. It is a complicated legal and political and budgetary problem and one we will be watching closely.

I have mentioned to you earlier that every one of our state associations expect the state appropriation for independent higher education to increase in the years to come. There is no particular conflict in my statements when I point out to you that this increase may be at a lower rate in the future than it has been in the past.

The fact is that in every state of which I have knowledge, higher education, as a whole or any part thereof, has a lower priority than it had five or ten years ago. In this regard we are therefore pretty much in the same boat as the state-supported institutions. I would simply point out to you that the boat is not in as good a condition as it once was.

Partly out of budgetary restraints, partly because almost everyone in government accepts as given that the enrollments in higher education will decline for the next decade or two, and partly because there is that fundamental change in the atmosphere in almost every state capital that I have just mentioned; for all of these reasons we are clearly moving into the time of planning and coordination, and it is to these twin areas that I would next like to turn our attention.

I think it is fair to say that for the entire history of higher education in America there was no government directed planning, there was no government directed coordination; we just grew and expanded and blossomed as the times seemed to demand. I think it is also safe to say that the states have individually and collectively decided that that is a luxury they can no longer afford. We are going to see educational planning in the states and we are going to see coordination.

There are still a great number of important questions remaining after we have made that statement. Do the independent colleges and universities want to be involved in the planning and/or the coordination? If they do, in what ways? If they are involved, should they be treated the same as the state-supported institutions or should the state accept the basic differences between the independent institutions and the state-supported institutions in the fundamental areas of control and funding and mission and purpose?

We should recognize at the outset that planning and coordination can have a number of benefits for the independent sector. For the first time the state-supported institutions are going to have to really justify their existence and any expansions they have in mind. No more will the state-supported institutions be able to willy-nilly establish a low tuition institution next door to or close by an independent institution that is meeting the educational needs of the community. No more will the state-supported institutions be able to get away with their very interesting and imaginative bookkeeping methods of costing and pricing.

All of this can well be to the good, but it still does not really answer the underlying question that runs through all that I have said up to now. What

should be the roles and relationships between the states and the independent sector of higher education?

I would like to begin that part of my discussion by making several statements that reflect my deep felt opinions. Government is not inherently evil. Government is not necessarily bad. Government at its best — and perhaps at its worst — really is us. But . . .

There is an important, there is a vital distinction that must be maintained between the role of any private citizen or business — and especially the particular role of independent higher education — and the general societal role that is that of any government.

All of which leads me to the point of my speech and to the title of my speech.

All of us in this business and profession tend to be verbal people. I am certain that everyone of us here has our favorite quotation — or quotations. I would like to share with you one of my favorites. It is a favorite of mine partly because I think it contains an important basis of truth, but also because I am not personally over-endowed with either modesty or self-doubt and I therefore need to be reminded from time to time (my friends sometimes tell me that it should be more often than I am generally willing to admit) of the truth inherent in this quotation. It is from, of all persons (considering the quotation) Oliver Cromwell, and it goes:

> By the bowels of Christ I beseech you,
> Bethink you that you may be mistaken.

The fact that we are all collected here together these few days for this meeting, the fact that we are all connected with independent colleges and universities is evidence enough that each of us feels deeply about our beliefs and our convictions. We do not think we are mistaken. I am sure that each of us at least hopes and believes we are correct in our beliefs.

What if we are correct in our beliefs? What if we are not mistaken? Our lives will have been worthwhile. We will have made this world a better place in which to live. We will have moved mankind a little closer to an understanding of the God-given truth for which all of us so earnestly search.

But what if we are mistaken? At the worst, parts of our lives will have been wasted and those who believed us and followed us will have been misled. And the world and our general society and our respective states will continue on their way.

What if, on the other hand, the government intrudes into the internal operations of our institutions, or if we voluntarily give up some of our independence and autonomy, and the government is mistaken in their policies? Or, for that matter, what if we give up our independence or have it taken from us, and the government is not mistaken?

In either case our independence is gone. It is just that the worst of the impact will be pervasive throughout all of society whenever government intrudes upon the freedom of its citizens, and it is that much worse when the policies of the government are mistaken.

The priceless reason for our existence as independent institutions is our independence, our diversity, our ability to search for meaning and truth as we see it and in our own ways.

As I have tried to point out to you today, the relationships between the states and the independent colleges and universities are in a flux. I do not think that there is any question but that we will never go back to the relationships that existed at the turn of the century or even in the 1940's or 1950's. The question that remains is, what does the future hold for us?

At least part of the answer to that question lies in our own hands. I hope that I have given you some information as to what is happening in the states in regard to independent higher education, and what may happen. More important, I hope I have raised questions in your minds as to what you want our relationship with the states to be.

Government money is powerfully tempting and the ease of letting government make our own decisions for us is also tempting. It is easy to console ourselves with the thought that government actions in themselves can be for better or for worse, and they need not be all bad.

What you and I, and everyone else in independent higher education, have to decide is how to, at the same time, maintain our independence while we continue to take our place in the structure of society and as a legitimate part of our government. In that noble cause I pledge to you my personal commitment, and I can assure you that NAICU, as the National Association of Independent Colleges and Universities, will also play its full role.

And so as I raise the warning banner to all government that before they move against the rights or independence of any of us they should consider, as Cromwell so aptly said, "Bethink you that you may be mistaken," I also challenge each of you to join with me in the endless efforts to maintain the cherished independence of the institutions we here today represent.

Thank you, and God-speed.

Herbert D. Schwartman

# The Administration's Preparation for and Approach to Faculty Collective Bargaining

by Herbert D. Schwartman

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Despite the great strides made by your administration in both the governance and financial aspects of your university, your faculty has concluded that it is better off dealing with the administration through a union and not individually. If you are from a private university which has a gross annual revenue from all sources (excluding only contributions which, because of limitations of the grant, are not available for use as operating expenses) of not less than $1 million, and the union has been certified, for at least twelve months (irrespective of any change of heart by the faculty), you are required to bargain in good faith with the union which has just been elected under the National Labor Relations Act.[1]

After the initial reaction wears off, the next question that must be faced by you, as president, is, "What do we do now?"

## THE BARGAINING TEAM

The initial step is for you, as president, alone or with the aid of your board of trustees to determine members for the administration's bargaining team. Practical considerations govern the size of the team. In order to encompass the variety of skills which are required, at least three individuals are warranted; on the other hand, a group larger than seven tends to be unwieldy.

Generally, either side can choose its negotiators as it sees fit, and neither can control the other's selection. Persons selected should have thorough knowledge of the institution including its past and present problems and strengths, have diverse personalities, and be upper-level administrators who have the ability to make decisions. In this connection, it is essential to have persons who are completely familiar with the finances of the institution as well as others who are familiar with the academic policies and procedures.

If you have an attorney on the staff of your institution, especially one with a background in labor relations, he[2] should certainly be a member of the bargaining team.

It is also important to have on the team one administrator whose duty will be coordination of the bargaining activity. Although he may not be in a position (or indeed may not even have complete knowledge) to assess all of the financial and academic implications of bargaining, all information should be funneled through him. Similarly, his office should be responsible for the myriad details as well as recordkeeping.

In connection with the selection of a bargaining team, at least three things should be borne in mind:

1. Neither you, the president, nor any member of the board of trustees should be a member of the bargaining team. Both you and the board should, of course, be kept informed of progress and be expected to furnish guidance to the administration's team, but presence in the negotiating room should be avoided. The reasons for this are twofold. First, it is more likely that a definite commitment on a particular subject can be forced by a union in the negotiating sessions if either the president or a board member is present. While the members of the negotiating team must have sufficient authority to effectively recommend a settlement of the issues involved, there is no obligation that the negotiating team itself must be able, in all respects, to make binding commitments which are not subject to review by either the president and/or the board. If, however, the agreements of the negotiators are made subject to

ratification by the board of trustees, the union should be notified of that fact at the commencement of negotiations. Secondly, in a similar and practical vein, negotiations tend to become quite heated. Whereas it may not be inappropriate for an administrator to engage in the vituperations that often attend negotiating sessions, it is obvious that neither the president nor a member of the board should be placed in that position.

2. Determining the level from which the negotiating team should be chosen depends upon the size and nature of the particular institution. If the institution has many schools and colleges, and if general administrative policy is, in the last analysis, made by persons above the rank of dean, an overall view would be appropriate; vice presidents, not deans, should be chosen to serve as negotiators. Another reason for excluding deans from the team is that they are often too close to the day-to-day situation; because of this, a good portion of negotiations may very well wind up as discussions of the particular faults and defaults of a dean-negotiator.

3. Whether or not an outside labor attorney should be a member of the negotiating team also depends upon the expertise of those at the institution. Where the particular union involved negotiates only through faculty members, much may be lost by bringing in an outsider. Not only is this likely to create mistrust by the union of the unknown individual, but, especially with the academic psyche, may also result in a situation in which the faculty bargainers will spend most of the negotiating sessions engaged in a duel to outwit the outsider. If, however, no member of the administration's bargaining team has the necessary expertise, an outside attorney should be selected not only on the basis of his skill in labor relations but also on the basis of his experience in the ways of the academic world. To some extent, the presence of the outside attorney can be lessened if, at least in the negotiating room, he stays in the background as much as possible.

Another question which must be faced is choosing the chairman of the negotiating team. While much has been said about whether the chairman should be an attorney, academician, or financial officer, the choice depends more upon his recognized integrity and ability to face problems calmly (both mentally and physically) than does his particular expertise. If the administration's bargaining team does its job and if after discussions it speaks with a single voice, the particular expertise of the person who acts as chairman is of little consequence.

While we have been speaking of the negotiating committee, mention should be made that all research and related work is not done solely by the negotiating team. Also, not all policy decisions rest solely on the negotiators' shoulders. In this connection, it is necessary to have "back-up" and "back-down" committees.

## SUPPORT COMMITTEES

The committee which I shall refer to as the "back-up" committee should consist of the president and a small committee from the board of trustees. This committee has a threefold purpose: first, to appraise the board of negotiations and the problems involved in them; second, to furnish guidance regarding future courses of action to be taken by the negotiating team; and third, to enable the negotiating team to proceed with the security of knowing that at the eleventh hour the negotiators will be supported by the board of trustees.

The committee which I will call the "back-down" committee should be composed of deans and other persons with knowledge of day-to-day situations at the institution. In this way, the negotiators will not only be aware of particular problems then present on campus, but may also obtain greater insight into the ramifications of the solutions they intend to propose or accept.

## PREPARATION FOR UNION DEMANDS

When the committees have been formed, the following matters must be attended to by the negotiators:

1. Each individual must free himself as much as possible from other duties so that he can give adequate time to the negotiations. You should all recognize that a significant amount of time will be taken up by negotiations. I have referred to meetings between the negotiating committee, the back-up and back-down committees; but time will also be needed to gather myriad information and prepare a multitude of documents. Also, it is likely that daily caucuses will be held among members of the administration's bargaining team. Finally, a significant amount of time and effort must be expended in the negotiating room.

2. Statistics must be compiled on the various members of the unit for whom the negotiations are taking place. For example, how many full-time and adjunct faculty members are employed by the university; what is their compensation for work performed during the academic year, for overtime, and for the summer session? How many faculty are taking advantage of fringe benefits? How many faculty members are tenured; what is the ratio of tenured to non-tenured faculty? What is your faculty distribution with regard to rank?

The compilation of this information will require a significant amount of time on the part of your staff. In addition, it is likely to be expensive. However, the need for this information is essential. Contrary to popular belief, hard bargaining is not served solely by rhetoric. Hard bargaining entails having the hard facts with which you can convince the

union of the validity and propriety of your offers and the unrealistic nature of theirs.

3. Ascertain what has been stressed in the past by the particular union with which you are bargaining. Information should be obtained from other colleges and universities which have negotiated bargaining agreements with that union. You should attempt to obtain the negotiated agreements and the demands presented by the union. The latter may be hard to obtain since, ordinarily, the negotiating teams put restrictions of confidentiality on these demands. If you can obtain the demands, however, they can be used to assess the priorities stressed by the union. By comparing the demands with the negotiated agreements, you will be able to determine what the union was willing to settle for.

In the event that the union which has organized your faculty has not previously negotiated a collective bargaining agreement at another campus, you should nevertheless seek to obtain similar information from institutions which have recently negotiated collective bargaining agreements. The same esprit de corps which exists among university administrators exists among faculty unions, and they will exchange information in the same manner as do college administrators. Nor should you feel restricted to obtaining informations from only those colleges and universities which have collective bargaining agreements in effect. Information as to wage and salary scales, for example, at comparable institutions which are not engaged in collective bargaining might prove quite useful. In this connection, the annual salary surveys of the American Association of University Professors are often of extreme importance.

4. Become familiar with the various documents published by the American Association of University Professors. Even those faculty unions which do not have AAUP affiliation have not shown any reluctance to seek to impose, through negotiations, such AAUP principles as are contained in the 1940 *Statement on Academic Freedom and Tenure* and the 1966 *State on Government of Colleges and Universities.*

5. Review both the written and unwritten practices of the university, of each school in the university, and if possible of each department. It is likely the union will ask for a continuance of past practices. While this demand may seem innocuous at first, unless you know all of the little "side deals" which have been made by lower-echelon administrators year after year, you could be in serious difficulty.

6. Ascertain long-range trends at the university. Is there any likelihood of eliminating schools or programs thereby possibly reducing faculty in the future? On the other hand, do you expect an increase in enrollment in a particular area which would cause concentrated hiring of faculty in that area?

7. Analyze the union's request for data. There is an obligation on the part of the administration to supply to the union, upon request, relevant information to enable the union to bargain intelligently. Usually these requests for information are submitted prior to actual negotiations; analyzing them can furnish some indication about the direction the union intends to take.

8. Find out what the present "gripes" are. Has there been any recent furor over governance, wages, benefits, inequities, etc.?

9. Know the status of the current job market since wages and benefits can be affected by the law of supply and demand.

10. Know the backgrounds of members of the union's negotiating team. Try to ascertain their interests and what they have previously stressed on campus.

11. A "battle plan" should be agreed upon, setting forth the course of conduct to be followed if the union seeks to use external pressure. For example, the union may threaten to walk out of the negotiations, to give adverse publicity to the university, to picket the university and the individual members of its board, or to strike. Unless the administration's bargaining team recognizes these possible eventualities and knows how it will deal with them, a mere threat by the union could cause chaos to the administration. It is essential for the president and the board of trustees to be intimately involved in preparing such a battle plan. If, for example, the president and the board are willing to risk a strike over some specific issue, prior knowledge of this fact will greatly aid your negotiating posture.

12. Assess priorities. How much do you intend to offer as a final settlement? How much is a long-term contract worth? How much are you willing to pay to keep "nonmonetary" items the way they are or to change them to the benefit of the administration?

In order to more easily effectuate the priorities, the negotiators should engage in offensive bargaining. The natural tendency is to sit back and wait until the union serves its demands and then respond to those demands item by item. This is defensive bargaining; an approach of this type rests upon the faulty premise that all of the employment conditions at the institution are favorable to the administration. At most institutions there are procedures which are antiquated, situations which are unfair, and innovations which the administration considers appropriate. Collective bargaining is a two-way street and the administration has the right to make its own proposal as to what is most favorable to the institution. This is offensive bargaining.

## SUBJECTS OF BARGAINING

In order to prepare the administration concept and to effectively counter many of the demands which can be expected from the union, it is essential to know the legal scope of the subjects of bargaining.

Under the National Labor Relations Act there are three broad categories of matters sought to be raised in bargaining.

1. *Mandatory Subjects of Bargaining.* These are matters relating to "wages, hours, and other terms and conditions of employment."[3] It is an unfair labor practice to refuse to discuss the matters within the area of mandatory subjects of bargaining.

2. *Permissive Subjects of Bargaining.* These are matters which, although not illegal, do not come within the phrase "wages, hours, and other terms and conditions of employment." It is not an unfair labor practice to refuse to discuss a permissive subject of bargaining; such subjects may be discussed but insistence upon their inclusion within a contract is an unfair labor practice.

3. *Illegal Subjects of Bargaining.* It is an unfair labor practice to seek to include illegal subjects of bargaining within a collective bargaining agreement, and there is no need to bargain with regard to such subjects. However, the number of illegal subjects of bargaining is extremely limited; they relate to such matters as a closed shop, preferential hiring of union members, or a provision that is inconsistent with the union's duty of fair representation.

The subjects of wages and hours are easily identifiable. In addition to salaries, the following wage topics have been most often included in collective bargaining agreements in colleges and universities: tuition remission; merit increases; pension plans, as well as insurance (health, life, etc.). Again, matters affecting hours, although they can take various forms, are also easy to identify. They may be attempts to limit the work year or the work day. Most often, however, they are attempts to reduce the number of semester hours of credit which the faculty is required to teach.

With regard to matters other than wages and hours, the scope of subjects which have traditionally involved faculty participation (and which may therefore be sought in higher education bargaining) is far more pervasive than that usually involved in industry. As stated by Professor Clyde Summers:

*"Whoever heard of the union in industry helping to choose the corporation, or the president, the plant superintendent, or the shop foreman? Do unions in industry decide what should be produced, what raw materials should be bought, or what processes should be used? The traditional structure of the University is that faculty members have a role . . . that reaches far beyond even the wildest dreams of the most radical unions."*[4]

In light of this perceptive analysis and other factors, I do not share a fear of many effects of "industrial-type bargaining." In the first place, each industry tends to bargain in a way which is different from others. For example, the types of negotiations involving General Electric are poles apart from those involving the entertainment unions. In the second place, the Office of General Counsel of the Labor Board (as distinguished from the Labor Board itself) has in three recent opinions indicated that at least some of the matters encompassed in governance subjects are permissible (as opposed to mandatory) subjects of bargaining.[5] Accordingly, I believe it is likely that the National Labor Relations Board may very well restrict the legal scope of bargaining for colleges and universities in the same way it restricts subjects in other bargaining situations. For it to do otherwise might very well lead to a situation in which General Motors would be required to negotiate on matters involving governance thereby enabling employees to become involved in such matters as the steel content of automobiles or whether the company should produce more Buicks than Oldsmobiles.

This conclusion does not mean that bargaining about various aspects of governance is necessarily illegal. What it does mean is that the National Labor Relations Board may decide not to *require* the parties to bargain about them.

Thus, it is possible to bargain about such matters if both parties so desire; but the fact that a subject has traditionally involved faculty participation, has been previously bargained about or agreed upon, or is often included in collective bargaining agreements in academia does not by itself convert the topic into a mandatory subject of bargaining.

In summary, there are subjects which may arise in the course of bargaining which are clearly mandatory subjects and other areas in which faculty had participated that legally need not be negotiated by the administration bargaining team. Determination of into which category a particular subject fits is a legal one, and counsel should be consulted.

A question that is often asked is, "Why shouldn't the administration be willing to discuss any matter at the bargaining table, irrespective of whether it is mandatorally bargaining or not?" After all, say the proponents of this view, "If there is a problem, why shouldn't we work out a solution at the bargaining table?" The answer is that once a subject is on the bargaining table, you may have difficulty removing it without a quid pro quo. Accordingly, I submit that a non-mandatory subject of bargaining which is proposed by the union should be objected to unless it is to the present or future advantage of the institution or unless you are relatively

sure that you can obtain a negotiating advantage. Obviously, the administration may desire to resolve many problems a union might raise which are not mandatory subjects of bargaining. These should, however, be resolved either administratively or in forums other than collective bargaining sessions (i.e., the university, senate, faculty councils, etc.)

## THE EXCHANGE OF DEMANDS

Technically, the administration may sit back and wait for a specific request for bargaining from the union. If you have not yet completed your preparations for the negotiations, this may be the wisest course to follow. On the other hand, if you are ready, the appropriate modus operandi is to contact the union and set up a schedule for the exchange of demands and a date for an organizational meeting between both sides.

It serves no useful purpose if the negotiators walk into a negotiating session and have the union serve them with a set of demands. Irrespective of the nature of the demands, it would be possible, a timetable should be developed in which the union first serves their demands. Sufficient time should then be given for the administration to analyze the demands and submit a response or counter-proposal. Then, the bargaining sessions should begin.

At this time, it is necessary to determine with precision the total cost and full implications of all items in the union's demands. All members of the team should review the demands to ascertain the full consequences of a possible commitment.

The care which must be taken to analyze all of a demand's ramnifications is illustrated by the recent plight of a brewery owner. In his collective bargaining agreement he agreed that workers could consume as much beer as they desired, thinking only in terms of the rather miniscule cost of the product. However, he was almost put out of business by having to hire additional relief men as an inexorable result of calls to nature that are caused by excessive beer drinking. You may face similar indirect results.

1. Any demand for an increase in wages must be viewed in light of other items which are based upon salary. For example, in addition to the cost of a wage increase, if the university's contribution to TIAA is a percentage of the faculty member's salary, the additional cost of applying that percentage to a higher base should also be considered. Again, if either overtime or summer session compensation is based upon the base salary, an increase in the base would produce a greater cost.

2. Consideration must be given to the effect of the union's demands upon persons not represented by the union. If, for example, your administrators have always been furnished with the same wage increases or benefits as the faculty, you may, as a practical matter, be forced to pass along many of the union gains.

3. The union may seek to limit or obtain compensation for duties which had previously been part of the faculty member's responsibility. Thus, it may have been usual for a faculty member, in addition to his teaching schedule, to mentor doctoral dissertations, to spend time advising students, to serve on committees, etc. A faculty union may seek to obtain additional compensation for these services or to limit the amount of time required for them. It may also attempt to reach the same result by attaching semester hours of credits to such duties.

4. In addition to seeking fringe benefits which have not theretofore been available at the university, the union may demand fringe benefits to which the faculty member had previously contributed on a non-contributory basis. Aside from the cost of paying what formerly had been the participating faculty member's share, you would have to anticipate the additional cost for participation by all faculty members since all are likely to avail themselves of benefits for which they do not pay.

5. Many might consider a tuition remission program for children and spouses of faculty members to be just a bookkeeping entry. Yet, if having those additional students in a class section necessitates additional sections or requires allowing a course "to go" because of additional students obtaining the benefits of tuition remission, the costs may be significant.

6. Any demand by the union to reduce the number of semester hours of credit the faculty is expected to teach has far-reaching academic and fiscal implications. Such matters affecting the teaching load of faculty members may result in less work for the same or greater pay, may necessitate the hiring of additional adjunct and full-time faculty, may require the availability of additional facilties, or result in the possibility of capital expenditures to provide those facilities. These same consequences may result from attempts to limit class size or student load.

7. Similarly, the union may seek to obtain a reduction in the teaching load of particular individuals for work performed as a member of the union's negotiating team or its grievance committee or performed by faculty on various personnel and other committees set forth in the collective bargaining agreement or otherwise. This reduction likewise can be significant especially if, by giving a reduced teaching load to a faculty member, an adjunct would have to be hired or overtime would have to be paid to the remaining members in the department.

8. Although the faculty's primary responsibility in areas such as appointments, reappointments, promotion, tenure, curriculum, and new programs is almost universally

recognized, any acquiescence to a demand by a faculty union to obtain unbridled control over these matters can have a strangling effect on the educational and fiscal viability of the institution.

After you have reviewed the union's demands and assessed their fiscal and other implications, the next step is to answer the demands. If you have determined to engage in defensive bargaining, each of the items should be considered seriatim, and a response made to each. One approach, at least insofar as fiscal items are concerned, is to bargain from a total money package. Thus, for example, in response to all of the union's demands which have fiscal implications you may want to state, "This item has fiscal implications and is dealt with in the attachment." The attachment in turn will be a dollar figure representing the total amount of money which the administration is willing to offer at the time. You will, of course, end up bargaining as to the amount of the total money package; but assuming that you have recognized all of the fiscal implications of the various demands and that you have accurate information as to their actual costs, by proceeding in this way you have the safety of knowing the extent of your financial liability.

How much you should offer initially as the sum total of financial liability depends upon both a value judgment and a common sense determination. The rule of thumb which I believe should be followed in responding to the union's fiscal and other demands is that you should never submit a response or a counter-proposal which you would be ashamed to have the faculty see. If you do not follow this rule, and a strike is threatened, you will be in an exceedingly embarrassing situation.

If you engage in offensive bargaining you may simply desire to put in the administration's total first offer and respond to the union's demands by rejecting all demands you do not believe conform to the administration's package. Of course, you will ask for more than you expect to receive and offer less than you are willing to give. But, as in defensive bargaining, try to avoid any position which could be considered absurd.

## THE ORGANIZATIONAL MEETING

During the period in which the demands and counter-proposals are in the process of formulation, it is wise to have an organizational meeting between the union and the administration team. The prime purpose of the organizational meeting is to set forth the ground rules to be followed during the negotiations. Thus, for example, the following items are ordinarily discussed and agreed upon in advance:

1. Time and location of meetings.
2. Questions to be directed to the chairmen of the respective teams who will answer or direct questions to the member most qualified to respond.
3. Each side to keep its own minutes.
4. Caucuses to be available to either side upon request.
5. Meetings not to be open to the public.
6. No publicity by either party without prior notification to the other party.
7. No agreement on any issue until there is agreement on all issues.
8. Determination of the order in which subjects should be discussed.
9. That the agreements of the union negotiators are subject to ratification by members of the unit, and the agreements of the administration's negotiators are subject to ratification by the Board of Trustees.

## CONDUCT OF NEGOTIATIONS

**Legal Considerations.** The National Labor Relations Act defines collective bargaining as,the obligation:

*"to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or the making of a concession . . ."*[6]

It is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[7] Correspondingly, it is an unfair labor practice for a union to "refuse to bargain with an employer provided it is the representative of his employees . . ."[8]

The duty to bargain in good faith is an obligation to participate actively in deliberations with the intent of reaching an agreement. The National Labor Relations Board has described the test of good faith in bargaining as "not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table."[9] All of the relevant facts are studied in determining whether the party is bargaining in good or bad faith. However, where a party only goes through the motions of bargaining, his "surface bargaining" will not satisfy the obligation to bargain in good faith. For example, in one case the negotiator for the employer took the position that it was the employer's intention to continue its present wage practices without bargaining. She insisted upon a verbatim transcript of the negotiations, would only meet with the union at her own office apartment, and refused to permit the union to inspect the plant for the ostensible purpose of obtaining greater familiarity with the bargaining issues. In a concurring opinion, the chairman of the National Labor Relations Board

stated that:

*"Any single one of [the agent's] idiosyncrasies, such as insisting on a specified meeting place, might well not be enough, standing alone, to support [a] . . . finding. But it is impossible for anyone experienced in negotiations to read this record and not conclude that the combination of strategems utilized by [the agent] was designed to produce a complete breakdown in negotiations, rather than agreement.*[10]

*One final note regarding the legal obligations to bargain. Inextricably bound with the obligation is the duty to supply the union, upon request, with sufficient information to enable it to prepare for and participate in bargaining. Of special significance is the requirement that an employer arguing an inability to pay is required to furnish proof of the accuracy of the argument and, in effect, to open many of its financial records to the union.*

**Practical Considerations.** No two negotiations are alike. The tenor of each particular negotiation can be influenced by such factors as the militancy of the union, its ability to obtain faculty support, the personalities of the union negotiators and the economic climate in which the negotiations take place. Yet there are some considerations which tend to be involved in the conduct of all labor negotiations.

1. The administration's team should be completely familiar with all matters to be discussed on a particular negotiating day. It should already have formulated its positions and responses. If, however, an item is placed on the table which has not been fully studied, and if its implications are not readily apparent, the administration's team should either caucus (which is not a sign of weakness) or put the matter over to another day. In this connection, it is also not a sign of weakness to ask the union for the full meaning, implications, and rationale of any proposal which is unclear.

There is no need to come to an agreement upon any issue within the negotiation room until it has been determined, in the relative calm of an administration caucus, that the matter is completely acceptable. Too many negotiators have been harmed by too readily agreeing to a matter which on the surface looks enticing but which has far more pervasive implications. Such matters cannot be fully analyzed in the few moments between the time when the union makes its proposal and looks to your team for an answer.

2. Recognize that the negotiating process is a long and arduous one. A union, especially one in its first negotiations, must justify its existence to the faculty. It seeks to to this not only by attempting to obtain greater benefits for the faculty, but also by showing its constituents that it is working hard on their behalf. Accordingly, irrespective of good will, it is unlikely, no matter how generous the university's offer, that it will be readily accepted. Indeed, if the negotiations are concluded quickly, the administration may very well be faced with a reaction by the faculty to the effect that if their union could obtain so much in so little time, perhaps the union should spend additional time attempting to get more.

3. The administration's team should have the ability to recognize and understand not only the problems they are facing but also the problems that are being faced by the union. The union is a political entity composed of various factions which may at times have diverse interests. For example, the interests of the non-tenured faculty may differ from those of the tenured faculty; the interests of the younger faculty may differ from those of the older faculty; the interests of the graduate faculty may differ from those of the undergraduate faculty. By being alert to these problems you may often be able to take advantage of the priorities which the union feels it must follow.

Whether in determining relative priorities of the union's constituency or in regard to other demands by the union, a refusal to listen is neither a sign of acumen or strength. It does not take bargaining expertise to continually say no. It is obvious that you will be greatly mistaken if you proceed on the assumption that the union negotiators are there solely to help the administration; it is less obvious but perhaps an even greater mistake to think that they are solely intent upon harming the university. Accordingly, the administration's negotiators need not only an understanding of the administration's problems, but also an understanding of the union's problems, and the ways, if any, that the union's problems can be solved without doing an injustice to the university.

If you negotiate with the philosophy that the union may not always be wrong and that there may be problems on campus which can be settled to the advantage of both sides (or even to the slight disadvantage of both sides), you will progress with greater dispatch and with far more effective results.

In addition to listening, watching is also important. By carefully viewing your counterparts on the union side of the table, you may often be able to discern the effect of an administration proposal or the response to a union proposal. A glance, a smile, or a frown may often foretell the true position with regard to the matter under discussion.

4. Although you may run into a legal duty to make your studies available to the union, your problems and positions should, if possible, be supported by facts. The effect of showing a union negotiator who has been decrying the poor salary scale at the university that your faculty salaries rank higher either in the area or nationally can be devastating. Moreover, when the union recognizes that you are armed with facts, they are less likely to continue with exhorbitant demands and conversely

**are more willing to come to a reasonable position earlier in the negotiating process.**

5. Keep the negotiations moving. Following a full discussion, it may happen that because of the adamant position of either or both of the negotiating teams or the apparent insolubility of the problems, continued discussion at that time will merely be an exercise in futility. If this situation arises, the best thing to do is to put the matter aside or to designate a subcommittee from each of the bargaining groups to develop a proposed solution. The subcommittee approach is not, however, appropriate for monetary items. On these matters, it is likely that all members of the union's negotiating team and all members of the administration's negotiating team will want to be involved.

6. Maintain both a sense of decorum and a sense of integrity. The law seeks to put both the employer and the union on an equal basis for the purpose of bargaining. Some of the members of the union's negotiating team may, in an over-reaction to the legalities, act in a way which is neither justified nors appropriate in an academic setting. While there are times when the administration will have to react to such conduct, the reaction ordinarily should be both dignified and professional. Perhaps the goal that the administration should strive for can be best illustrated by the accolade given to Charles E. McCarthy, Vice President for Business Affairs and Treasurer of St. John's University, by an official of the faculty union at the University:

*"Final decisions were clearly in the hands of the university treasurer, a man with considerable high-level corporate experience. He demonstrated a dedication to the university and firm yet fair convictions which gained the respect of negotiators on both sides of the process."*[11]

Finally, it should be recognized that perhaps more negotiations are successfully concluded over the luncheon table than over the bargaining table. More often than not, in negotiations there will be an off-the-record relationship between the chairmen or some other member of each of the bargaining team. The advantage of these off-the-record discussions cannot be overestimated. While at the bargaining table the representatives of the union are not only trying to convince the administration but may also be trying to assuage other members of the union's team. By having these off-the-record conversations, extraneous factors can be eliminated and a practical discussion of the problems facing the respective teams explored.

Although I have placed great emphasis on the administration's team acting in a reasonable and dignified manner, it should never be forgotten that collective bargaining is essentially an adversarial process. In both negotiating and drafting the agreement, care must be taken to assure that the administration does not bargain away matters which were never intended to be included in the collective bargaining agreement. To engage in negotiations upon the premise that ambiguities will be resolved solely through the good will of both sides is more often than not the height of naivete. To engage in drafting the agreement without the aid of legal counsel may result in disaster, the author strongly urges that legal counsel be consulted.

*The author wishes to express his appreciation to the National Association of College and University Business Officers for their permission to use passages from a prior article written by the author.

[1] There is some question as to whether a school which espouses a particular religion and which is owned and operated by a religious order or denomination is under the National Labor Relations Act. With regard to this question, as well as the various other legal matters referred to herein,

[2] Lest there be any implication of an attempt to bar women from the negotiating team, I borrow from the St. John's University collective bargaining agreement and categorically state that references to "he," "him," and "his" shall be construed in the "masculine, feminine or neuter as the context and circumstances may require."

[3] Section 8(d) of the National Labor Relations Act. The subjects of mandatory bargaining are also defined in section 9(a) of the National Labor Relations Act as "rates of pay, wages, hours of employment or other conditions of employment." As I am aware of no substantive distinction between both statutory definitions, I will refer to the more concise definition of section 8(d).

[4] Summers, *Michigan's Public Employment Act and the State's Colleges*, pp. 81-82 (1967).

[5] Quarterly Report of General Counsel of NLRB for 1975, 89 L.R.R. 200 (St. John's University, New York); Quarterly Report of General Counsel of NLRB for 1975, 91 L.R.R. 12 (Cooper Union); Endicott College, Case no. 1-CB-3337, unreported Advice Memorandum of General Counsel of N.L.R.B., March 18, 1977.

[6] Section 8(d) of the National Labor Relations Act.

[7] Section 8(a)(5) of the National Labor Relations Act.

[8] Section 8(b)(3) of the National Labor Relations Act.

[9] Times Publishing Co. 72 NLRB 676, 682-3 (1947).

[10] *West Coast Casket Co.*, 192 NLRB no. 78, 78 LRRm 1026.

[11] Frederick Hueppe, "Private University: St. John's," in Duryea, Fisk and Associates, eds. *Faculty Unions and Collective Bargaining*, (London, 1973), p. 175.

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